Supreme Court, U. S.
FILED
AUG 31 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-3341

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL.,
APPELLANTS,
v.
STATE TAX COMMISSION, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Jurisdictional Statement.

CHESTER M. HOWE,
MAXWELL D. SOLET,
GASTON SNOW & ELY BARTLETT,
One Federal Street,
Boston, Massachusetts 02110.
(617) 426-4600
Attorneys for the Appellants.

ADDISON C. GETCHELL & SON, INC. · THE LAWYERS' PRINTER · BOSTON

Table of Contents.

Jurisdictional statement	1
Opinion below	2
Jurisdiction	2
Questions presented	4
Statement of the case	6
The Federal questions presented are substantial	11
A. The Massachusetts statute discriminates against Federal savings and loan associations both individually and collectively	11
B. Massachusetts credit unions are mutual thrift and home financing institutions similar to Federal savings and loan associations	16
C. The tax imposed on net operating income of Federal associations is not an "income" or "franchise" tax within the meaning of 12 U.S.C. § 1464(h) and does not otherwise conform with the Federal statute	19
D. The Massachusetts statute violates the Commerce Clause by its failure to provide for apportionment of income derived from other states	23
E. The use of separate and unequal standards for measuring deductions for required additions to reserves violates the Due Process Clause and Equal Protection Clause	25
Conclusion	25
Appendix A	27
Appendix B	47
Appendix C	51

Appendix D 53
Appendix E 61

Table of Authorities Cited.

Cases.

American Oil Co. v. Neill, 380 U.S. 451 (1965) 3
Complete Auto Transit, Inc. v. Brady, 45 U.S.L.W. 4259 (March 7, 1977) 22
First Federal Savings and Loan Association v. State Tax Commission, Mass. Adv. Sh. (1977) 895 2, 7, 9-10-11, 12, 13, 16, 17, 18-19, 20, 22, 23, 27
Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939) 24
International Shoe Co. v. Washington, 326 U.S. 310 (1945) 25
Laurens Federal Savings & Loan Assn. v. South Carolina Tax Commission, 365 U.S. 517 (1961) 2, 14, 16
McLaughlin v. Florida, 379 U.S. 184 (1964) 25
Morrissey v. Commissioner, 296 U.S. 344 (1935) 17-18
National Geographic Society v. California Board of Equalization, 45 U.S.L.W. 4343 (April 4, 1977) 24
Porter v. Aetna Casualty & Surety Co., 370 U.S. 159 (1962) 20
Sneed v. Shaffer Oil & Refining Co., 35 F. 2d 21 (8th Cir. 1929) 22-23
Standard Pressed Steel Co. v. Department of Revenue of Washington, 377 U.S. 436 (1964) 24
State Tax Commission v. John H. Breck, Inc., 336 Mass. 277, 144 N.E. 2d 87 (1957) 21

United States v. State Tax Commission, 481 F. 2d 963 (1st Cir. 1973) 8, 14, 15, 25, 61
United States v. State Tax Commission, 348 F. Supp. 397 (D. Mass. 1972) 8
Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965) 3

Constitutional Provisions and Statutes.

United States Constitution,
Fourteenth Amendment 2, 3, 5, 11, 23, 25
Due Process Clause 2, 3, 5, 11, 25
Equal Protection Clause 2, 3, 5, 11
Commerce Clause 2, 5, 10, 23
12 U.S.C. §§ 1421-1429 6
12 U.S.C. §§ 1461-1468 6
12 U.S.C. § 1464(h) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15, 17, 18, 19, 22, 25, 26
12 U.S.C. § 1726(b) 7, 12
28 U.S.C. § 1257(2) 3, 4
28 U.S.C. §§ 1257(3) and 2103 4
Emergency Home Finance Act of 1970 16
Home Owners' Loan Act of 1933, § 5(h) 4
Mass. G.L. c. 63, § 11 4, 6, 7, 14, 20, 22, 23, 24, 25, 50
c. 63, §§ 11(*a*)(1) and 11(*b*)(1) 3, 4, 6, 8, 9, 50
§§ 11(*a*)(2) and 11(*b*)(2) 6, 50
c. 63, §§ 11(a)(2)(*ii*) and 11(b)(2)(*ii*) 14, 50
c. 63, § 11(*iii*) 7, 50
c. 63, § 18A 7
c. 63, § 51 7

Mass. G.L. c. 168, § 58 7, 12
Mass. G.L. c. 170, § 38 7, 12
Mass. G.L. c. 171, § 13 18
Mass. G.L. c. 171, § 24(*b*)(7) 18
Mass. G.L. c. 231, § 111 8

MISCELLANEOUS.

A. J. Casner, 4 American Law of Property, § 17.5, n. 63 (1952) 24
Accounting Research Bulletin No. 43, c. 8, ¶12(b) 21
Annual Report of Massachusetts Commissioner of Banks for 1973, § B 19
4A Mertens, Law of Federal Income Taxation, §§ 26.10 and 26.04 (1972) 21

Supreme Court of the United States.

OCTOBER TERM, 1977.

No.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL.,

APPELLANTS,

v.

STATE TAX COMMISSION, ET AL.,

APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Jurisdictional Statement.

This is an appeal brought by all of the Federal savings and loan associations of Massachusetts (the "Associations") from a decision of the Supreme Judicial Court of Massachusetts upholding the validity of a Massachusetts statute imposing a tax on each of the Associations.

The Supreme Judicial Court of Massachusetts held that Massachusetts did not exceed the authority to tax Federal savings and loan associations granted by Congress to the states under 12 U.S.C. § 1464(h) despite its finding that the tax imposed discriminates in favor of Massachusetts-chartered institutions. The Court designated the Federal Home Loan Bank Board as the source

of the discrimination, not the Commonwealth. The test imposed by the Massachusetts Court requires the Federal instrumentalities to show they are at a "substantial competitive disadvantage" in order to invalidate the tax. Such a standard conflicts with that established by this Court in *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Commission*, 365 U.S. 517, 523 (1961), in which this Court stated that 12 U.S.C. § 1464(h) "unequivocally bars discriminatory state taxation of the Federal Savings and Loan Associations." The Massachusetts Court also rejected the Associations' argument that the tax in question resulted in discrimination prohibited by the Federal statute because of the exemption of Massachusetts credit unions and rejected the argument that the tax in question was not imposed on a subject of taxation permitted under the Federal statute.

Finally, the Massachusetts Court rejected the contention by the Associations that the taxing statute as applied to them was in violation of the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

To permit these holdings of the Supreme Judicial Court of Massachusetts to stand is likely to have significant impact on taxing policies toward Federal savings and loan associations in all states.

Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported at Mass. Adv. Sh. (1977) 895, 363 N.E. 2d 474, and is set forth in Appendix A.

Jurisdiction.

On April 16, 1975, Appellants filed a Complaint for Declaratory Relief in the Superior Court for the County

of Suffolk, Commonwealth of Massachusetts, in which they sought declarations that the Massachusetts statute imposing a tax on Federal savings and loan associations, Massachusetts G.L. c. 63, §§ 11(*a*)(1) and 11(*b*)(1), was invalid and unenforceable as applied to such associations on the grounds that it: (a) was outside the scope of the authority granted by Congress to the states in 12 U.S.C. § 1464(h) to tax such Federal instrumentalities, (b) violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U. S. Constitution, and (c) violated the Commerce Clause of the United States Constitution and on various State statutory and constitutional grounds.

The Superior Court reserved and reported the case on a record consisting of the pleadings, a stipulation of facts, and an affidavit in support of Appellants' motion for summary judgment. The Supreme Judicial Court of Massachusetts granted Appellants' request for direct appellate review. On May 3, 1977, the Supreme Judicial Court entered a final judgment ordering that a declaratory judgment be entered in the Superior Court for the County of Suffolk, upholding the validity of the State statute in all respects. A Notice of Appeal to this Court was filed in the Supreme Judicial Court of Massachusetts on July 20, 1977. The Notice of Appeal is set forth in Appendix B.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). Since the Supreme Judicial Court of Massachusetts upheld the validity of a State statute which had been drawn in question on the ground of its being repugnant to the Constitution and laws of the United States, this matter is appropriately brought to this Court by appeal. *See, e.g., Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965); *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965).

The statutory provisions the validity of which is involved herein are Massachusetts G.L. c. 63, §§ 11(*a*)(1) and 11(*b*)(1), which provisions, together with a definition also found in said § 11, are set forth in Appendix C.

If this Court does not consider appeal to be the proper method of review, the Appellants request that this document be treated as a petition for writ of certiorari pursuant to 28 U.S.C. §§ 1257(3) and 2103.

Questions Presented.

Under § 5(h) of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(h), states may not impose a tax on Federal savings and loan associations or "their franchise, capital, reserves, surplus, loans, or income greater than that imposed . . . on other similar local mutual or cooperative thrift and home financing institutions."

Massachusetts imposes a tax measured in part by deposits and in part by "net operating income" on Federal associations and on certain local thrift institutions. Massachusetts credit unions are exempt from the tax. In arriving at "net operating income" a deduction is allowed for "operating expenses." No deduction is allowed for interest or dividends paid to members of a savings and loan association. A deduction is allowed for "minimum additions . . . to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities." Since Federal savings and loan associations are subject to lower surplus requirements, their allowable deductions are less than those available to Massachusetts-chartered cooperative and savings banks and their income subject to tax is thus greater.

The questions which result are:

1. Does 12 U.S.C. § 1464(h) prohibit the acknowledged discrimination in favor of Massachusetts institutions which results from the allowance of deductions for minimum required additions to guaranty fund or surplus?

2. Are Massachusetts credit unions, which are conceded to be "local mutual or cooperative thrift and home financing institutions," "similar" to Federal savings and loan associations under 12 U.S.C. § 1464(h)?

(a) Is "similarity" to be judged by the statutory powers of the two kinds of entities?

(b) Is "similarity" to be judged by the presence or absence of factual competition? If so, is such competition to be measured collectively or by an individual comparison?

(c) If the proper test is statutory powers, are the powers of such entities "similar?"

(d) If the proper test is factual competition, have Appellants established competition collectively and individually?

3. Is the tax imposed on "net operating income" authorized by 12 U.S.C. § 1464(h)?

4. Does the Massachusetts statute violate the Commerce Clause of the United States Constitution by its failure to provide for allocation or apportionment of income to other states?

5. Does the use of separate and unequal standards for measuring deductions for required additions to guaranty fund or surplus result in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

Appellants are Federal savings and loan associations which are chartered pursuant to 12 U.S.C. §§ 1461-1468, and each is a member of the Federal Home Loan Bank System pursuant to 12 U.S.C. §§ 1421-1429. Collectively, the Appellants constitute all of the chartered Federal savings and loan associations located within the Commonwealth of Massachusetts. Although located within the Commonwealth, the Appellants derive substantial income from mortgage loans and participations with respect to real estate outside Massachusetts. Appellants are all located within 100 miles of another state, and at least one appellant is located in a city on the border of Connecticut, Maine, New Hampshire, New York and Rhode Island.

The Federal statute authorizing state taxation of Federal savings and loan associations provides:

> No State . . . shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.
>
> 12 U.S.C. § 1464(h).

In 1966, Massachusetts enacted § 11 of Chapter 63 of the Massachusetts General Laws, imposing a tax on all Federal savings and loan associations located in the Commonwealth and on State-chartered savings banks and cooperative banks, but not on Massachusetts credit unions. A tax is imposed on "net operating income" (§§ 11(*a*)(1) and 11(*b*)(1)) and on deposits (§§ 11(*a*)(2) and 11(*b*)(2)). The deposits tax is imposed semiannually, returns being required in July and January, while the income-based tax is an annual tax. The critical provisions of the income-based portion of the Massachusetts statute are that (1) no deduction is allowed for payments to depositors in arriving at net operating income despite the fact that such payments represent, by a large measure, the principal cost of operations, and (2) deductions from net operating income are allowed for

> minimum additions during the taxable years to . . . [the] guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities . . . .
>
> Mass. G.L. c. 63, § 11(*iii*).

A Massachusetts cooperative bank must set aside into a guaranty fund 10% of its assets at the rate of 5% of net profits per year. Mass. G.L. c. 170, § 38. A Massachusetts savings bank must set aside 7½% of deposits at the rate of ⅛ to ¼ of 1 percent of total deposits. Mass. G.L. c. 168, § 58. By contrast Federal associations are required to set aside only 5% of insured accounts, which requirement must be met within twenty years or, if mortgage needs so require, within thirty years. 12 U.S.C. § 1726(b). The rate of additions is determined by the Federal Savings and Loan Insurance Corporation, which is subject to the Federal Home Loan Bank Board. The Massachusetts Supreme Judicial Court found that the effect of the above difference in reserve requirements was adversely discriminatory to the Federal associations but not repugnant to § 1464(h). Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d 474, 484.

A table comparing the statutory powers of Federal savings and loan associations, Massachusetts credit unions, Massachusetts cooperative banks and Massachusetts savings banks is set forth in Appendix D.

Appellants paid the taxes imposed by c. 63, § 11, but for various assessment periods some or all of them protested the assessment of the tax and filed applications for abatement in accordance with Mass. G.L. c. 63, §§ 18A and 51. After denial of the applications for abatement, the

United States, on behalf of the Appellants, challenged the deposits element of the tax on several statutory and State and Federal constitutional grounds by seeking declaratory relief in the Federal District Court for the District of Massachusetts. The District Court held the deposits element of the tax to be in violation of 12 U.S.C. § 1464(h) and the Supremacy Clause. *United States* v. *State Tax Commission*, 348 F. Supp. 397, 400 (D. Mass. 1972). The Court of Appeals affirmed the holding on the exclusive ground that the tax was discriminatory. *United States* v. *State Tax Commission*, 481 F. 2d 963, 970 (1st Cir. 1973). The opinion of the Court of Appeals is set forth in Appendix E.

Some of the Appellants intervened in the Federal court litigation in order to challenge the net operating income element of the tax, but the Court of Appeals held that a challenge to that portion of the tax (§§ 11(*a*)(1) and 11(*b*)(1)) could more appropriately be decided in a State forum. The Appellants commenced an action for declaratory relief in the Suffolk (Massachusetts) Superior Court on April 16, 1975 and stayed proceedings which had been commenced before the Appellate Tax Board of the Commonwealth. On December 24, 1975, the parties agreed in writing as to all the material facts in the case and filed motions for summary judgment. Prior to a decision with respect to those motions, and at the request of all parties, the Superior Court judge reported the case without decision to the Appeals Court on January 30, 1976, pursuant to Mass. G.L. c. 231, § 111. An appeal was entered in the Appeals Court on March 12, 1976. On March 29, 1976, Appellants applied in writing to the Supreme Judicial Court for direct review, which application was granted on April 15, 1976. Briefs were submitted and oral argument held, and on May 3, 1977, the Supreme Judicial Court issued a decision rejecting all of Appellants' challenges to

the tax on income and holding Mass. G.L. c. 63, §§ 11(*a*)(1) and 11(*b*)(1) not to be in violation of either 12 U.S.C. § 1464(h) or the Federal Constitution. *First Federal Savings and Loan Association* v. *State Tax Commission*, Mass. Adv. Sh. (1977) 895, 363 N.E. 2d 474.

The Federal questions raised in this appeal from the decision of the Massachusetts Supreme Judicial Court were all raised in the initial Complaint for Declaratory Relief. In paragraphs 82, 85, and 88 thereof the Appellants asserted that the tax imposed by the Massachusetts statute is not a tax authorized by 12 U.S.C. § 1464(h). In paragraph 110 they alleged that the failure to extend the tax to Massachusetts credit unions renders it discriminatory in violation of 12 U.S.C. § 1464(h). In paragraphs 102 and 94, respectively, they alleged violations of the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The prayers for relief sought declarations that the Massachusetts statute was invalid for all the foregoing reasons. Because the case was reserved and reported from the Superior Court directly to the Appeals Court and the Supreme Judicial Court subsequently granted a request for direct review, these issues were all properly before the Supreme Judicial Court.

The Supreme Judicial Court considered each of the Federal issues separately and sustained the validity of the Massachusetts statute in all respects.

With respect to the 12 U.S.C. § 1464(h) issues, the Court stated:

> We think that the purpose of § 1464(h) is not frustrated by the circumstance that reserve or guaranty fund requirements differ. The cause of the discrimination is the lower requirements imposed by the Federal regulatory agency on Federal savings and loan asso-

ciations. The Commonwealth is not the source of the discrimination. The excise statute is wholly neutral.

> Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d 474, 482.

It also stated:

> The test for similarity [of credit unions and Federal savings and loan associations] is not what each type of institution might do but rather what each does in fact . . . . The proper method of measuring similarity may be a collective, rather than an individual, comparison.
>
> *Id.* at 913, 914, 363 N.E. 2d 474, 484.

Despite its finding that approximately 42% of credit union loans were in real estate mortgages, the Court found a failure of proof that "credit unions compete substantially . . . for the same types of investors and the same class of borrowers." *Id.* at 914, 363 N.E. 2d at 484. Hence it held that failure to tax credit unions did not lead to discrimination against Federal savings and loan associations in violation of 12 U.S.C. § 1464(h). The Court did not comment on the fact that at least one credit union had over 80% of its assets invested in real estate mortgage loans.

With respect to the Commerce Clause issue, the Supreme Judicial Court stated:

> The record shows that collectively the associations invest a substantial portion of their funds (about 29% in 1974) in mortgage loans secured by real estate located in other States. The record does not show the extent of the contacts of any association with any other State nor does it show whether, in the circumstances of its business operations, any other State does or could impose a tax or excise on any association. Of course, no other State could impose an excise on an association's privilege to do business in Massachusetts. . . . Even if we assume, as the associations argue, that the issue of burdening interstate commerce turns on what other States may do, and not what they do in fact, the associations have not met their burden of establishing that § 11 improperly imposes on interstate commerce. The record is devoid of any information with respect to the contacts and activities of any individual Federal savings and loan association in any other jurisdiction.

> *Id.* at 907-908, 363 N.E. 2d 474, 481 (citations omitted).

With respect to the Due Process and Equal Protection arguments, the Supreme Judicial Court stated:

> . . . [E]ven if we were to accept the assertion that the associations are placed in a separate class (because of the action of an agency of the Federal government), such a classification would not be impermissible. Legislative classifications for tax purposes are given wide respect in the face of constitutional challenges.
>
> *Id.* at 910, 363 N.E. 2d 474, 482-483.

The Federal Questions Presented Are Substantial.

A. The Massachusetts Statute Discriminates Against Federal Savings and Loan Associations both Individually and Collectively.

Massachusetts permits a deduction in determining net operating income for required additions to an institution's guaranty fund or surplus. Massachusetts cooperative banks are required to reserve 10% of assets at the rate of

5% of net profits annually. Mass. G.L. c. 170, § 38. Massachusetts savings banks are required to reserve 7½% of deposits at the rate of ⅛ to ¼ of 1% of deposits annually. Mass. G.L. c. 168, § 58. Federal associations are required to reserve only 5% of insured accounts; the rate of addition is governed by the Federal Home Loan Bank Board but must reach 5% of insured accounts within 20 years, or, under special circumstances, within 30 years. 12 U.S.C. § 1726(b). The rate of addition to guaranty funds or surplus has resulted in larger deductions and lesser taxes for the State institutions. The Supreme Judicial Court acknowledged the existence of this adverse discriminatory treatment of Federal associations collectively in the following terms:

> [W]e accept the [Federal] associations' assertion that, generally, the required contributions of a Federal savings and loan association to its surplus are less than those of similarly situated Massachusetts savings and coöperative banks.
>
> Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d 474, 482.

The Massachusetts Court failed to comment upon the demonstrated adverse individual discrimination which results from the dual standard for deductions for required additions to reserves, brought to its attention in the following language:

> The First Federal Savings and Loan Association provides a specific illustration of this type of discriminatory effect of c. 63, § 11. From 1970 to 1971 total deposits in the First Federal Savings and Loan Association grew from $75,101,331 to $79,975,993. At the end of the fiscal year terminated October 31, 1971, the North Attleborough Savings Bank had total deposits

> of $72,924,597 and the Milton Savings Bank had total deposits of $74,315,812. The former was required to transfer $174,500 to its guaranty fund and the latter $185,000, and each was entitled to a c. 63, § 11 deduction in the corresponding amount. However, the First Federal Savings and Loan Association was not required to set aside any reserve funds and thus did not qualify for a deduction, despite the fact that it did voluntarily transfer amounts to its reserve accounts.
>
> Brief to the Supreme Judicial Court of Massachusetts 32 (citations omitted).

Thus, the problem of whether § 1464(h) is to be construed on the basis of an individual or collective comparison was avoided by Appellants by demonstrating discrimination at both levels. The Court chose to nullify the effect of the discrimination. It stated:

> The cause of the discrimination is the lower requirements imposed by the Federal regulatory agency on Federal savings and loan associations. The Commonwealth is not the source of the discrimination.
>
> Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d 474, 482.
>
> The operation of § 11 in conjunction with the less strict reserve requirements applicable to Federal savings and loan associations has not been shown to present a substantial competitive disadvantage.
>
> *Id.*

It is submitted that the source of adverse discriminatory tax treatment is an irrelevant inquiry. The plain wording of § 1464(h) is that no tax may be imposed on Federal associations "greater than" is imposed on local institutions. This Court has stated that § 1464(h) "unequivo-

cally bars discriminatory state taxation of Federal Savings and Loan Associations." *Laurens Federal Savings and Loan Association* v. *South Carolina Tax Commission*, 365 U.S. 517, 523 (1961). It having been established that the tax on Federal associations is greater, the State statute must fall. There should be no necessity to prove the extent of the "competitive disadvantage" which results. Further, the Federal statute imposes no tax; only the Massachusetts statute does that. Accordingly, the Massachusetts Court's conclusion that the Commonwealth is not the source of the discrimination is not supportable. The Massachusetts Court chose not to refer to the opinion of this Court in *Laurens*, despite its controlling effect.

Moreover, a review of the history of the deduction for additions to reserves supports the view that deliberately discriminatory treatment of Federal associations was intended parallel to that involved in the tax on out-of-state loans imposed by §§ 11(*a*)(2)(ii) and (*b*)(2)(ii) which was condemned by the Court of Appeals in *United States* v. *State Tax Commission*, 481 F. 2d 963 (1st Cir. 1973). The amount of, and rate of, addition to the reserves required for Massachusetts cooperative and savings banks were fixed by statute prior to the 1966 enactment of § 11, as was the amount of the reserve requirement for Federal associations. There is no reason to believe that the legislature acted out of ignorance rather than with knowledge of its own enactments. The legislature must have known the rates of addition and ultimate amounts of the reserves required of local institutions by statute. It is more probable that the legislature deliberately attempted to provide tax reductions for local institutions either as a distinct benefit or as an offset to possible competitive disadvantages which local institutions might incur by reason of more stringent reserve requirements imposed by local statutes. As the Court of Appeals said:

> Federal associations are entitled not to be singled out for special tax burdens; and it makes no difference whether the latter are expressly written into the statute or are tailored, as here, more subtly.
>
> 481 F. 2d at 970.

It might be argued, as the Massachusetts Court suggests, that the Federal Home Loan Bank Board could, by accelerating the rate of required contributions by Federal associations to reserves, reduce, eliminate or reverse the discriminatory tax result for one or more years. For example, if the eventual 5% of insured accounts reserve requirement for Federal associations were fixed as a requirement by the Federal Home Loan Bank Board to be met in one year's time rather than over 20 years, the Federal associations probably would have a larger deduction, in the one year, than the State institutions. The argument fails, however, since the larger reserve requirement of State institutions will necessarily provide larger total deductions eventually. In the case of Massachusetts cooperative banks, the deductions in time will be more than twice those of a comparable Federal association.

More importantly, the power conferred upon the Federal Home Loan Bank Board to regulate the rate of addition to reserves of Federal associations is obviously designed to advance the national purposes of promotion of thrift, safety, and the regulation of the supply and flow of funds for home financing. The power clearly was not conferred to neutralize discriminatory state taxing policy; that result is mandated by § 1464(h). It should be noted that the Federal Home Loan Bank Board has employed its power to alter or suspend additions to reserves on a number of occasions, while Congress extended to 30 years the period in which to satisfy the reserve require-

ment, if "necessary to meet mortgage needs," in the Emergency Home Finance Act of 1970.

Rather than view the *Laurens* case as controlling, the Massachusetts Court imposed, as a test of discriminatory tax treatment, the necessity of a showing by the Federal associations that they were at "a substantial competitive disadvantage." The test is alien to the judgment of this Court in *Laurens*.

The Massachusetts Court also asserted:

> Because of lower reserve requirements, Federal associations tend to have more funds available for immediate distribution to members than similarly situated State institutions.
>
> Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d 474, 482.

The assertion is pure speculation and is contrary to fact. The record is devoid of evidence concerning the relative dividend paying capacity of the types of institutions. Moreover, permissible dividends are primarily a function of action by appropriate regulatory authorities. For example, in 1971, the Massachusetts Bank Commissioner authorized State-chartered banks to pay 5.25% interest on regular savings accounts at a time when Federal associations were limited to 5%. In order to remain competitive, the Federal Home Loan Bank Board made an exception to its nationwide interest limitation of 5%, authorizing a rate of 5.25% for its Massachusetts members.

B. Massachusetts Credit Unions Are Mutual Thrift and Home Financing Institutions Similar to Federal Savings and Loan Associations.

That Massachusetts credit unions are "local mutual or cooperative thrift and home financing institutions" has been conceded. *See* Mass. Adv. Sh. (1977) at 912, 363 N.E. 2d 474, 483. The issue here is what standard should be used to determine whether credit unions are "similar" to Federal savings and loan associations within the meaning of 12 U.S.C. § 1464(h) and whether the standard has been met.

The Associations urge that the proper standard of comparison is the statutory powers conferred upon the two kinds of entities. The Massachusetts Court rejected this standard, stating: "The test for similarity is not what each type of institution might do but rather what each does in fact . . . ." Mass. Adv. Sh. (1977) at 913, 363 N.E. 2d 474, 484. In so holding, the Court failed to distinguish the opinion of this Court in *Morrissey* v. *Commissioner*, 296 U.S. 344 (1935), the leading case on classification of entities as associations taxable as corporations, trusts, or partnerships under the Internal Revenue Code.

In *Morrissey*, a trust with transferable shares had been created to develop a tract of land through the improvement and sale of a portion of the tract and to construct a golf course on the balance of the land. All sales activity had been completed prior to the beginning of the tax years before the Court. The trustees argued that the absence of business activities in the years before the Court should be taken as evidence of the character of the trust. This Court rejected the test of "what each does in fact," imposed here by the Massachusetts Court, adopting instead the test of "what each type of institution might do." It stated:

> The fact that these sales were made before the beginning of the tax years here in question . . . did not alter the character of the organization. *Its character was determined by the terms of the trust instrument.* . . . The powers conferred on the trustees con-

tinued and could be exercised for such activities as the instrument authorized.

296 U.S. at 361 (emphasis added).

Massachusetts credit unions are permitted to engage in substantial home financing, being authorized to invest up to 80% of the sum of their shares, deposits, guaranty fund, reserve fund and undivided earnings in real estate mortgage loans upon terms substantially identical to those authorized for Federal associations. Mass. G.L. c. 171, § 24(*b*)(7). Unlike Federal credit unions, there is no restriction on membership in either type of entity, and members of both are entitled to vote. Mass. G.L. c. 171, § 13. The two areas of principal dissimilarity between Massachusetts credit unions and Federal associations are (1) credit unions may pay 8% interest on deposits while Federal associations are limited to 5.25% and (2) credit unions are admonished by statute to give preference to personal loans while Federal associations are not. However, no method of enforcement for the latter provision is prescribed. Under 12 U.S.C. § 1464(h), the "local mutual or cooperative thrift and home financing institutions" to which Federal associations must be compared need only be "similar," not identical. Massachusetts credit unions are limited by statute to dealing with the individual, non-commercial depositor and borrower, whose business they share with Federal associations. Their statutory powers allow them to appeal to such customers by offering the the same basic types of financial services as do such associations.

Rejecting the statutory powers test in favor of a factual inquiry, the Massachusetts Court concluded that:

> The associations have not shown that credit unions compete substantially with Federal savings and loan associations for the same types of investors and the same class of borrowers. Nor have they shown the extent, if any, to which credit unions and Federal savings and loan associations are in direct competition with each other.
>
> Mass. Adv. Sh. (1977) at 914, 363 N.E. 2d 474, 484.

That conclusion is wrong. In 1972, credit unions, in the aggregate, had approximately 42% of their total loans in real estate mortgages. Mass. Adv. Sh. (1977) at 914. That Federal associations had larger percentages so committed does not rebut this evidence of real and substantial competition. Individually, more than twenty credit unions had more than 50% of their total assets invested in real estate loans, with one credit union investing 86.3% of its assets in real estate loans in 1973. Massachusetts credit unions held assets approximately equal to ½ those held by Federal associations. Annual Report of Massachusetts Commissioner of Banks for 1973, § B.

If the statutory powers of Massachusetts credit unions and Federal associations are to be compared in judging similarity of the two kinds of entities, relief should be granted to the Federal associations. If, instead, the proper standard of comparison is what the two kinds of entities actually do, either collectively or individually, the evidence shows substantial competition on both an individual and a collective basis, thus justifying the relief sought.

C. The Tax Imposed on Net Operating Income of Federal Associations Is Not an "Income" or "Franchise" Tax within the Meaning of 12 U.S.C. § 1464(h) and Does Not Otherwise Conform with the Federal Statute.

The fundamental error in the decision of the Massachusetts Court is the apparent view that the Federal limita-

tion on a state's authority to tax is simply that no greater tax may be imposed on Federal associations than is imposed on local institutions. That view assumes that the enumerated bases of taxation, *viz.*, "franchise, capital, reserves, surplus, loans, or income," are merely illustrative of, rather than limitations on, the permitted subjects of taxation.

It may be noted that the Massachusetts Court characterized the tax imposed by Mass. G.L. c. 63, § 11 as a franchise tax while the U. S. Court of Appeals treated the taxes imposed under § 11 as two separate taxes. The Court of Appeals characterized the taxes imposed as an income tax and a deposits tax, invalidating the latter and leaving the former to be challenged in the State courts. Presumably, the characterization as an income or franchise tax, or otherwise, is properly made under the Federal statute.

While § 11 provides a deduction for operating expenses in determining "net operating income," the amount on which the tax is levied, the Massachusetts Court held that ". . . dividends and interest paid to members are not [deductible] 'operating expenses' . . . ." Mass. Adv. Sh. (1977) at 903, 363 N.E. 2d 474, 480. "Net operating income," so defined, does not conform to the longstanding definition of income of Federal associations for Federal income tax purposes. Dividends and interest paid to members are deductible under I.R.C. § 591. Additionally, this Court has analogized deposits in Federal associations with checking accounts, concluding that such deposits "actually retain the qualities of money," and are not permanent investments because they are not speculative and may be readily withdrawn. *Porter* v. *Aetna Casualty & Surety Co.*, 370 U.S. 159, 161-162 (1962). There should be no question under current concepts of Federal taxation that

this cost of retaining old deposits and attracting new deposits would be deductible as interest. *See* 4A Mertens, *Law of Federal Income Taxation*, §§ 26.10 and 26.04 (1972). Refusal to allow a deduction for interest payments on deposits precludes classification of the excise as an income tax within the meaning of § 1464(h).

Additionally, use of the deduction for additions to guaranty funds or surplus precludes characterization of the tax as one levied on income. Minimum additions to surplus or guaranty funds are irrelevant to a determination of income. Accounting Research Bulletin No. 43, c. 8, ¶12(b). Reserves are merely bookkeeping entries which are reflected on the balance sheet, not the income statement. Loss reserves are the total accumulation required to meet losses and are not a measure of the rate at which losses are sustained, and it is only the latter which are a measure of income. Such reserves are not a measure of income; they are neither amounts paid nor are they an estimate of expenses. Income cannot be determined by a factor which is in no way a measure of income.

If, instead, the Massachusetts excise is properly characterized as a franchise tax, as it was described by the Massachusetts Court, it still must fail since a franchise tax must properly reflect the value of the exercise of the Federal charter in the Commonwealth of Massachusetts. Provision must be made for exclusion from State taxation of income not attributable to Massachusetts. *State Tax Commission* v. *John H. Breck, Inc.*, 336 Mass. 277, 144 N.E. 2d 87 (1957). The record discloses that approximately 35% of the income of the Associations for the years involved was derived from loans secured by real estate outside the Commonwealth (R. 234). It is inconceivable that a statute which fails to provide for any apportion-

ment of income outside the Commonwealth under such circumstances could possibly accurately measure the value of the exercise of the franchise in the Commonwealth. *See Complete Auto Transit, Inc.* v. *Brady*, 45 U.S.L.W. 4259 (March 7, 1977).

Finally, § 11 is violative of 12 U.S.C. § 1464(h) simply because it provides for two different and unequal measures of tax for the State and Federal institutions. It is of no consequence whether the statute is, as the Massachusetts Court described it, "wholly neutral." Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d 474, 482. The presence or absence of discriminatory intent is not relevant under § 1464(h). The use of different measures as the basis of tax inevitably produces differences in the taxes payable. Section 1464(h) cannot be read to permit the use of separate and unequal standards. If, for example, the Massachusetts statute imposed a tax on deposits only of State institutions while Federal associations were taxed only on income, the statute, although neutral, would be outside the scope of § 1464(h). The concurrent use of a Federal standard and a different state standard is not authorized. Such standards preclude comparison. Even if the state statute were wholly neutral in its use of separate standards for imposition of the tax, fortuitous comparative tax burdens on state and Federal institutions are not within the design of § 1464(h). As stated in another case involving different measures of tax:

> If in a conceivable comparison between a domestic and a foreign corporation it should turn out that the foreign corporation paid no more or less than a domestic the result would be fortuitous; "the act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application."
>
> *Sneed* v. *Shaffer Oil & Refining Co.*, 35 F. 2d 21, 24 (8th Cir. 1929) (citation omitted).

D. The Massachusetts Statute Violates the Commerce Clause by Its Failure to Provide for Apportionment of Income Derived from Other States.

The Massachusetts Court conceded that Mass. G.L. c. 63, § 11 fails to make any attempt to distinguish between income received from activities within the State and activities outside the State. Mass. Adv. Sh. (1977) at 907, 363 N.E. 2d 474, 481. The Court further acknowledged that "*collectively* the associations invest a substantial portion of their funds (about 29% in 1974) in mortgage loans secured by real estate located in other States," but upheld the statute on the ground that "the record is devoid of any information with respect to the contacts of any *individual* Federal savings and loan association in any other jurisdiction." *Id.* at 907-908, 363 N.E. 2d 474, 482 (emphasis added). This distinction between the collective and individual activities of the Associations is without substance. A significant number of individual associations must necessarily be in the business of making out-of-state real estate loans if nearly a third of the Associations' collective assets are invested in such loans.

By their very nature, mortgage loans involve significant contacts with the state in which mortgaged property is located. All states have systems for the recording or registration of mortgages and other instruments which create interests in real property. *See* A.J. Casner, 4

American Law of Property § 17.5, n. 63 (1952). It is a matter for judicial notice that sound banking practice requires that mortgages be recorded. It is inconceivable that the Associations might have failed to record mortgage loans representing 29 percent of their assets. Moreover, an extensive program of mortgage investment must inevitably have resulted in periodic foreclosures. The use of a state's recording system and foreclosure procedures establishes a direct nexus between the activities of the associations and the recording state. *See, National Geographic Society* v. *California Board of Equalization*, 45 U.S.L.W. 4343 (April 4, 1977) (indirect benefits provided by police and fire departments establish power to tax). Therefore, the decision of the Massachusetts Court, based on the Associations' alleged failure to demonstrate that other states have the power to tax their activities, ignores reality and is clearly erroneous.

The Associations, by showing that they derive significant income from other states and that other states have the power to tax those activities, have demonstrated a substantial risk of double taxation. Such a risk will invalidate an unapportioned tax on gross receipts. *See, e.g., Standard Pressed Steel Co.* v. *Department of Revenue of Washington*, 419 U.S. 560 (1975); *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434 (1939). No matter what label is used to describe the tax imposed by § 11, the fact is that no deduction is allowed for the major expense of the Associations, *viz.* payments to members. For purposes of the Commerce Clause, the tax must be considered to be on unapportioned gross receipts and is, therefore, invalid.

E. The Use of Separate and Unequal Standards for Measuring Deductions for Required Additions to Reserves Violates the Due Process Clause and Equal Protection Clause.

On its face, Mass. G.L. c. 63, § 11 appears to treat State-chartered banks and Federal associations equally. In operation, however, the statute makes a distinction which is arbitrary, unreasonable and much to the detriment of the Federal associations. The reserve deduction allowed State-chartered banks is determined by the legislature and has remained fixed since the statute was enacted in 1966. The reserve deduction allowed Federal associations is determined by Congress and the Federal Home Loan Bank Board and has been repeatedly adjusted to reflect goals wholly unrelated to tax considerations.

The staute thus distinguishes between the Federal associations and State-chartered banks despite the fact that they are "similar" for purposes of 12 U.S.C. § 1464(h). *United States* v. *State Tax Commission*, 481 F. 2d 963, 968 (1st Cir. 1973). The use of totally different methods for computing the same deduction for members of the same class under the same tax statute violates the due process requirement of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), that economic regulation not be "unreasonable, arbitrary or capricious." *Id.* at 319. Moreover, it violates the equal protection requirement that a law must apply equally to all those within appropriate classifications. *See, e.g., McLaughlin* v. *Florida*, 379 U.S. 184, 190 (1964).

Conclusion.

The tax sustained by the Massachusetts Court represents a significant additional cost of home financing and ownership The current estimate of annual cost is two million

dollars in Massachusetts alone. The search for additional sources of revenues by the several states has been well publicized. As a consequence, it may be anticipated that the Massachusetts approach is likely to be pursued in the several states. In Appellants' view, the Massachusetts approach is unsound and represents a serious threat to the well-being of the Federal instrumentalities and the national policies fostered by them.

Necessarily, serious interpretive problems exist where the Congressional grant to the states of authority to tax is contained in only one sentence. Despite the 44 year existence of § 1464(h), little, if any, authority exists which indicates the extent to which state taxation is permitted, as opposed to beng prohibited, by the Federal enactment. Massachusetts has adopted an approach which authorizes taxation of Federal and state institutions on bases which are not comparable, imposes a stringent burden of proof of factual competition, and, contrary to the intent of the Federal statute and the opinion of this Court, permits adverse discriminatory treatment of Federal associations.

Probable jurisdiction should be noted and the decision of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted,

CHESTER M. HOWE,
MAXWELL D. SOLET,
GASTON SNOW & ELY BARTLETT,
One Federal Street,
Boston, Massachusetts 02110.
(617) 426-4600
Attorneys for the Appellants.

Appendix A.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON & others[1] *v.* STATE TAX COMMISSION & another.[2]

SUFFOLK. November 4, 1976. - May 3, 1977.

CIVIL ACTION commenced in the Superior Court on April 16, 1975. [Case No. 641.]

The case was reserved and reported by *Hallisey*, J., to the Appeals Court. The Supreme Judicial Court granted a request for direct review.

Chester M. Howe for the plaintiffs.

Howard Whitehead, Assistant Attorney General, for the defendants.

---

[1] The other plaintiffs are: Boston Federal Savings and Loan Association; Colonial Federal Savings and Loan Association; Security Federal Savings and Loan Association of Brockton; Second Federal Savings and Loan Association; Freedom Federal Savings and Loan Association (formerly First Federal Savings and Loan Association of Worcester); Union Federal Savings and Loan Association of Boston; Metropolitan Federal Savings and Loan Association (merged into Metropolitan Savings Bank which in turn merged into Union Warren Savings Bank); Bay State Federal Savings and Loan Association; First Federal Savings and Loan Association of Fall River; First Federal Savings and Loan Association of Cape Cod; First Federal Savings and Loan Association

WILKINS, J. The plaintiffs are all the Federally chartered savings and loan associations (associations) in the Commonwealth. They seek a declaratory judgment concerning various aspects of the excise which they are required to pay pursuant to G.L. c. 63, § 11(*a*)(1), and § 11(*b*)(1), the significant portions of which are set forth in the margin.[3]

of Lowell; Family Federal Savings and Loan Association (formerly Fitchburg Federal Savings and Loan Association); Natick Federal Savings and Loan Association; Union Federal Savings and Loan Association; Plymouth Federal Savings and Loan Association; Revere Federal Savings and Loan Association; Middlesex Federal Savings and Loan Association; Winter Hill Federal Savings and Loan Association; Waltham Federal Savings and Loan Association; Mutual Federal Savings and Loan Association of Whitman; First Federal Savings and Loan Association of Attleboro; Edward Everett Federal Savings and Loan Association; Scituate Federal Savings and Loan Association; Milford Federal Savings and Loan Association; Monument Federal Savings and Loan Association; Leader Federal Savings and Loan Association; Foxboro Federal Savings and Loan Association; People's Federal Savings and Loan Association; Bay Colony Federal Savings and Loan Association; Montello Federal Savings and Loan Association of Brockton (merged into Home Federal Savings and Loan Association); Home Federal Savings and Loan Association; Home Owners Federal Savings and Loan Association; and Northeast Federal Savings and Loan Association (merged into First Federal Savings and Loan Association of Worcester, now named Freedom Federal Savings and Loan Association).

[2] The Commissioner of Corporations and Taxation is also a named defendant.

[3] General Laws c. 63, § 11(*a*)(1), § 11(*b*)(1), and a certain definition, as appearing in St. 1975, c. 684, § 44, read as follows: "*Section 11.* Every savings bank as defined in chapter one hundred and sixty-eight, every co-operative bank as defined in chapter one hundred and seventy and every state or federal savings and loan association located in the commonwealth shall pay to the commissioner an annual excise equal to the following; (*a*) on or before the twenty-fifth day of the seventh month of the taxable year, there shall be paid (1) six hundred twenty-seven one thousandths per cent of a reasonable estimate of its net operating income, as hereinafter defined, for the taxable year, . . . (*b*) on or before the twenty-fifth day of the first month following the close of the taxable year, there shall be paid (1) one and two hundred fifty-four one thousandths per cent of its net operating income, as hereinafter defined, for the taxable year, less the estimated amount previously paid with respect to such income, ...

"For the purpose of this section, 'net operating income' shall mean gross income from all sources, without exclusion, for the taxable year, less (*i*) operating expenses, (*ii*) net losses upon assets sold, exchanged or charged off as uncollectible during the taxable year, and (*iii*) minimum additions during the taxable years to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities . . . ."

The associations argue that the defendant Commissioner of Corporations and Taxation (Commissioner) has misconstrued G.L. c. 63, § 11, by disallowing interest or dividends paid to members as a deduction in arriving at net operating income subject to the excise. They also challenge the excise in its entirety on several grounds, relying on constitutional arguments and on claims that the imposition of the excise is not authorized by Congress. The associations and the defendants moved for summary judgment. A judge of the Superior Court reserved and reported the case on a record which consists of the pleadings, a stipulation of facts, and an affidavit in support of the associations' motion for summary judgment. We granted the associations' request for direct appellate review. We conclude that none of the associations' arguments has merit.

Since 1966, when the income-based portion of the excise was added to the law (St. 1966, c. 14, § 11), the associations have been challenging the application to them of the income-based portion of the excise. Applications for abatement have been filed by the associations for the years 1966 to 1974, inclusive; those applications have been denied by the defendant State Tax Commission (commission); and

petitions under the formal procedure have been filed with the Appellate Tax Board.[4]

For an understanding of the background of this case, we should note Federal court proceedings which also dealt with the excise imposed on the associations by G.L. c. 63, § 11. In 1970, the United States filed a complaint in the United States District Court, District of Massachusetts, challenging the application of that portion of the excise which was based on the deposits of Federal savings and loan associations. Six of the plaintiff associations intervened in that action. The District Court concluded that the provisions of G.L. c. 63, § 11(*a*)(2)(*ii*), and (*b*)(2)(*ii*), resulted in an illegal disparity of tax treatment between Federal savings and loan associations and local savings institutions. *United States* v. *State Tax Comm'n,* 348 F. Supp. 397, 400 (D. Mass. 1972). The Court of Appeals agreed but vacated and modified the judgment in a respect not involving the District Court's central conclusion. *United States* v. *State Tax Comm'n,* 481 F.2d 963, 970-971 (1st Cir. 1973). The issues involved in that case are not before us here. As the result of the Federal litigation, the associations are exempt from the deposits-based aspect of the excise provided in G.L. c. 63, § 11, and those associations which filed timely applications for abatement have received refunds of all payments of that portion of the excise.

In conjunction with the action commenced by the United States, the six associations which intervened in that action filed another action challenging the income-based aspect of the excise of several grounds. Certain of the issues raised here by the associations were presented to the Dis-

[4] Certain of the associations have not filed timely applications for abatement for all years, but that circumstance is not crucial to our resolution of the issues presented in this case.

trict Court and, as indicated subsequently in this opinion, were rejected. *United States* v. *State Tax Comm'n,* 348 F. Supp. at 400-401. Another issue was not considered because the matter was pending before the commission. *Id.* at 401. On appeal the six associations argued the points raised below and pressed certain additional issues, including Federal and State constitutional claims. The United States did not join in the separate challenges advanced by the six associations. *United States* v. *State Tax Comm'n,* 481 F.2d at 966. The First Circuit Court of Appeals declined to pass on any of the issues raised by the six associations because the "taxpayers have adequate recourse to state courts for a determination of their claims." *Id.* at 972.

The defendants do not contend that, because the associations have not exhausted their administrative remedies before the Appellate Tax Board, a declaratory judgment should not be granted in this case. We agree that this is an appropriate case to deal with on declaratory judgment. The associations raise a broad challenge to G.L. c. 63, § 11, presenting questions of statutory construction and of constitutional law of importance to every Federal savings and loan association in the Commonwealth. Although not all of the questions are pure issues of law, because, as will be seen, in certain respects there are matters of proof involved, the resolution of the issues by a court in the first instance in a consolidated proceeding makes practical sense. In other situations of a somewhat similar nature, we have approved an exercise of discretion to grant a declaratory judgment regarding a tax statute. See *Sydney* v. *Commissioner of Corps. & Taxation,* Mass. , - (1976), and cases cited.[5] We turn then to the various arguments advanced by the associations.

[5] Mass. Adv. Sh. (1976) 2538, 2542-2544.

1. The associations argue that amounts paid members, as dividends or interest, are "operating expenses" which may be deducted in arriving at "net operating income." Section 11 of G.L. c. 63 defines "net operating income" as gross income from all sources less certain items, including "operating expenses." The dispute arises because "operating expenses" are not defined. The Commissioner has taken a consistent position that payments of interest or dividends to members are not "operating expenses" and hence are not allowable deductions.[5]

We are concerned, of course, with what the Legislature intended by the words "operating expenses." The associations rely in part on general accounting principles in support of their position. We see no basis, however, for assuming that the Legislature intended to import accounting practice into its statutory language and thus to permit accounting principles to be the guide to the meaning of the words "operating expenses." See *Ivan Allen Co.* v. *United States,* 422 U.S. 617, 635 (1975).

The parties have recognized that, if an association's obligation to a member were a debt, any periodic payment might be equated to the payment of interest and thus represent an operating expense; whereas, if periodic payments to members were equated to dividends, these payments would not be an expense in the traditional sense and thus not deductible. We are invited, as courts are in Federal tax cases involving this issue, to analyze the interest of a member to determine whether he has an equity interest or whether he is a creditor. See *Estate of Mixon* v. *United States,* 464 F.2d 394, 402 (5th Cir. 1972).

[5] The Commissioner's instruction sheet, applicable to excise returns of savings banks, cooperative banks, Federal savings and loan associations, and State savings and loan associations, states that "[a]mounts paid or accrued to depositors, savers or members, whether designated as interest or dividends, are not allowable deductions."

The relationship between an association and its members has elements common to an ownership status and to a debtor-creditor relationship. The charter of an association refers to account holders in terms of ownership and investment. It describes a holder of a savings account as a member who has (1) a right to vote on the election of directors, and to vote on charter amendments, by-laws, and resolutions, (2) a right to a pro rata distribution of net earnings (as defined) twice a year, (3) a right to withdraw his savings account on thirty days' notice, and (4) a right to a pro rata share of the value of the association's assets in the event of liquidation, dissolution, or winding up of the association. There is no fixed date of maturity of an association's obligation to its members, nor any fixed rate of return. A member's status is subordinate to creditors and, when withdrawal of funds is requested, a holder of a savings account does not become a creditor. These elements tend to demonstrate that a member is an investor, not a creditor.

The Federal enabling legislation states that one purpose of a Federal savings and loan association is to "provide local mutual thrift institutions in which people may *invest* their funds . . ." (emphasis supplied). 12 U.S.C. § 1464(a) (1970). See 12 U.S.C. § 1757(8)(D) (1970), as amended, 12 U.S.C. § 1757(8)(D) (Supp. IV, 1974), authorizing Federal credit unions to "invest" their funds in shares or accounts of Federal savings and loan associations. The Federal decisions concerning the relationship of a member and an association support the position that a member is an investor, not a creditor. See *Porter* v. *Aetna Cas. & Sur. Co.,* 370 U.S. 159, 161 (1962); *id.* at 163 (Douglas, J., concurring); *Wisconsin Bankers Ass'n* v. *Robertson,* 294 F.2d 714, 716 (D.C. Cir.), cert. denied, 368 U.S. 938 (1961). To the extent that the status of a member is determinative of

the question whether a periodic payment to him is a payment of interest or the payment of a dividend, the weight of circumstances supports the conclusion that any payment is more analogous to a dividend to an owner than to a payment of interest to a creditor.[6]

We come back, however, to the question of the meaning of the words "operating expenses." Even accepting our conclusion that the status of a member is more like that of an owner than that of a creditor, arguably the words "operating expenses" are ambiguous. In such a situation the consistent interpretation of a statute, since its enactment, by the agency charged with the administration of the law is entitled to consideration in resolving the ambiguity. See *Board of Educ.* v. *Assessor of Worcester,* Mass. , - (1975),[b] and cases cited. It is true that the Commissioner's interpretation, although highly visible as part of the instructions concerning the preparation of the appropriate excise return, is not expressed in the form of a regulation. We also recognize that the Commissioner's interpretation has been subject to objection from the beginning and, thus, is not a settled view, belatedly challenged. These facts, however, bear on the weight to be given to the Commissioner's position; they do not bar us from giving consideration to the Commissioner's view. See *Rockland Mut. Ins. Co.* v. *Commissioner of Ins.,* 360 Mass. 667, 675 (1971). We conclude that the Commissioner's position was adopted contemporaneously and publicly with the enactment of the statute and has been maintained consistently since. It is entitled to some weight in resolving the statutory ambiguity.

[6] We recognize that account holders have ready access to their funds as a practical matter and it is likely that they think of their interests as substantially equivalent to cash. In this sense, a holder of an account is unlike the owner of a share in a corporation who cannot withdraw his ownership interest from the corporation at will. In particular circumstances State courts have concluded that the hybrid relationship between a depositor in a savings and loan association and the association creates a debtor-creditor relationship. See, e.g., *Mengele* v. *Christiana Fed. Sav. & Loan Ass'n,* 287 A.2d 395, 397 (Del. 1972) (Federal savings and loan association); *Family Sav. & Loan Ass'n Shareholders' Protective Comm.* v. *Stewart,* 241 Md. 89, 96 (1965) (State savings and loan association).

[b] Mass. Adv. Sh. (1975) 2626, 2632-2633.

Our own assessment of the status of a member of a savings and loan association, the views of Congress and Federal courts in assessing the nature of the interest of a member of a Federal savings and loan association, and the Commissioner's interpretation all support the conclusion that dividends and interest paid to members are not "operating expenses" within the meaning of those words in G.L. c. 63, § 11.

2. The associations argue next that the excise imposed by G.L. c. 63, § 11, is invalid because it is not a tax authorized by Congress. A federally chartered savings and loan association is an instrumentality of the Federal government and is immune from State taxation in the absence of congressional authorization. *First Agricultural Nat'l Bank* v. *State Tax Comm'n,* 392 U.S. 339, 340 (1968). *M'Culloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 436 (1819). *United States* v. *State Tax Comm'n,* 481 F.2d at 969. A State may impose a tax "on such associations or their franchise, capital, reserves, surplus, loans, or income [no] greater than that imposed by . . . [the State] on other similar local mutual or cooperative thrift and home financing institutions." 12 U.S.C. § 1464(h) (1970). This statutory language seems to be concerned largely with preventing unfair tax discrimination against Federal savings and loan associations. See *Laurens Fed. Sav. & Loan Ass'n* v. *South Carolina Tax Comm'n,* 365 U.S. 517, 523 (1961). The variety of taxes authorized by Congress is very broad. Sub-

sequently, we shall consider the associations' arguments that the Massachusetts tax discriminates against Federal savings and loan associations in violation of 12 U.S.C. § 1464(h) (1970). Here, however, we face the claim by the associations that the Massachusetts excise is not a tax authorized by Congress. The argument is that the excise is an unauthorized tax on gross receipts.

The excise imposed by G.L. c. 63, § 11, is a franchise tax. Originally, the excise on savings institutions was measured solely by the amount of the institution's deposits. St. 1862, c. 224, §§ 4 and 5. We characterized the excise, as originally constituted, as a "franchise tax," a tax on the privilege of doing business in the Commonwealth. See *Provident Inst. for Sav.* v. *Commonwealth,* 259 Mass. 124, 126 (1927), and cases cited. In 1966, income was added to deposits as a measure of the excise. St. 1966, c. 14, § 11. This did not change the nature of the excise. A franchise tax measured in whole or in part by income is not unusual. *State Tax Comm'n* v. *John H. Breck, Inc.,* 336 Mass. 277, 299 (1957) (franchise tax on domestic business corporations under G.L. c. 63, § 32, expressed as an excise measured in part by income). *Commissioner of Ins.* v. *Commonwealth Mut. Liab. Ins. Co.,* 308 Mass. 385, 394-396 (1941) (franchise tax on domestic insurance companies under G.L. c. 63, § 22, expressed as an excise measured by premiums). Congress has authorized a nondiscriminatory franchise tax.

Even if we were to view G.L. c. 63, § 11, as providing a tax on income, we note that the excise is not directed against gross income but rather against "net operating income." The associations' argument that the excise is not a tax on net income relies largely on the claim, already discussed, that payments of interest or dividends are not allowed as a deduction in arriving at "net operating income." Such payments need not be deducted for the purpose of ar-

riving at a tax on income which is authorized by Congress and certainly need not be deducted to arrive at a franchise tax authorized by Congress.[7]

The associations' final contention that the excise is not authorized by Congress relies on the allowance as a deduction from gross income of "minimum additions during the taxable year to . . . [an association's] guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities . . . ." G.L. c. 63, § 11, as appearing in St. 1975, c. 684, § 44. The contention is that the excise under § 11 is not an income tax within the meaning of the authorizing Federal statute because required contributions to a guaranty fund or to surplus are not a true expense, and thus "net operating income," as defined, is not income, but it is something less than income. Without accepting the assumption that such a deduction would change an income tax to something else, we doubt that Congress intended that an excise could not be measured by net income reduced by amounts of income which by law may not be made available, at least immediately, to members or depositors as interest or dividends. In any event, as we have said, the excise is a franchise tax, and the allowance of a deduction from gross income for contributions to a guaranty fund or surplus does not make the excise any less so.[8] There is no showing that the allowance of such a

[7] We should not be understood to imply that a nondiscriminatory tax on gross income is forbidden by 12 U.S.C. § 1464(h) (1970). We need not pass on that point.

[8] In their reply brief the associations seem to argue that § 11 is invalid because the First Circuit Court of Appeals has held unconstitutional the excise on deposits under G.L. c. 63, § 11, as applied to Federal savings and loan associations. *United States* v. *State Tax Comm'n,* 481 F.2d at 970. They point out that the excise still applies to deposits of local savings institutions, thus creating discrimination and a failure to achieve the equality of treatment anticipated by the Legislature. This is not a circum-

deduction causes the franchise tax to fail to reflect fairly the annual benefit of the corporate privileges. See *State Tax Comm'n* v. *John H. Breck, Inc., supra* at 285.

3. The associations argue next that the excise is a gross receipts tax which violates the commerce clause of the United States Constitution. They point out that § 11 makes no distinction between income received from activities within the State and activities outside Massachusetts. The record shows that collectively the associations invest a substantial portion of their funds (about 29% in 1974) in mortgage loans secured by real estate located in other States. The record does not show the extent of the contacts of any association with any other State nor does it show whether, in the circumstances of its business operations, any other State does or could impose a tax or excise on any association. Of course, no other State could impose an excise on an association's privilege to do business in Massachusetts.

We have indicated already that § 11 does not constitute a tax on gross receipts. It is a franchise tax. The associations have not argued or shown that a franchise tax which uses net income of a local savings institution as a measure of the excise runs afoul of the commerce clause. Even if we assume, as the associations argue, that the issue of burdening interstate commerce turns on what other States may do, and not what they do in fact (but see *Standard Steel Co.* v. *Department of Revenue of Wash.*, 419 U.S. 560, 563 [1975]; *General Motors Corp.* v. *Washington*, 377 U.S. 436, 449 [1964]), the associations have not met their burden of establishing that § 11 improperly imposes on interstate commerce. *Norton Co.* v. *Department of Revenue*

stance of which the associations properly may complain. The Federal statute (§ 1464[h]) forbids discrimination against, but not discrimination in favor of, Federal savings and loan associations.

of Ill., 340 U.S. 534, 537 (1951). The tax is not invalid per se and, on this record, we cannot determine that it is forbidden by the commerce clause. See *Complete Auto Transit, Inc.* v. *Brady*, U.S. , n.15 (1977).[e] The record is devoid of any information with respect to the contacts and activities of any individual Federal savings and loan association in any other jurisdiction.

4. We come next to the first of the associations' arguments which assert that § 11 violates the mandate of 12 U.S.C. § 1464(h) (1970) that no tax on a Federal savings and loan association shall be "greater than that imposed" by the State on similar local thrift and home financing institutions. The associations contend that their "net operating income" tends to be greater than that of similar institutions because the deduction available to a Federal savings and loan association for "minimum additions . . . to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities . . ." (G.L. c. 63, § 11) is generally lower than the deduction available to a similar State savings institution. Additions to a guaranty fund of a local savings institution are required, in particular circumstances, by statute. G.L. c. 168, § 58 (savings banks). G.L. c. 170, § 38 (coöperative banks). Additions to the reserves of a Federal savings and loan association are prescribed by regulations of the Federal Savings and Loan Insurance Corporation. 12 U.S.C. § 1727(a) (1970), as amended, 12 U.S.C. § 1727(a) (Supp. IV, 1974). Although circumstances may vary from institution to institution and from year to year, we accept the associations' assertion that, generally, the required contributions of a Federal savings and loan association to its surplus are less than those of similarly situated Massachusetts savings and coöperative banks.

[e] 97 S. Ct. 1076, 1084 n.15 (1977).

We recognize that it is the effect of the operation of § 11 which must be assessed in determining whether the requirements of § 1464(h) have been met. *United States* v. *State Tax Comm'n,* 481 F.2d at 969-970. We think that the purpose of § 1464(h) is not frustrated by the circumstance that reserve or guaranty fund requirements differ. The cause of the discrimination is the lower requirements imposed by the Federal regulatory agency on Federal savings and loan associations. The Commonwealth is not the source of the discrimination. The excise statute is wholly neutral. We agree with the conclusion of the United States District Court judge on this issue. *United States* v. *State Tax Comm'n,* 348 F. Supp. at 401, vacated on other grounds, 481 F.2d at 976. The operation of § 11 in conjunction with the less strict reserve requirements applicable to Federal savings and loan associations has not been shown to present a substantial competitive disadvantage. Because of lower reserve requirements, Federal associations tend to have more funds available for immediate distribution to members than similarly situated State institutions. Congress must have recognized that reserve requirements would differ between Federal savings and loan associations and State savings institutions. The possible difference in competitive positions is inherent in the pattern of the Federal legislation.

5. The associations raise three constitutional arguments based on the fact that the allowable deduction for an association's contribution to its surplus is apt to be less than the similar contribution of a State institution to its reserves or guaranty fund.

The operation of the statute does not constitute a denial of due process or equal protection of the laws. There is no fundamental unfairness in the due process sense. Every institution is placed in the same classification for tax pur-

poses, but, even if we were to accept the assertion that the associations are placed in a separate class (because of the action of an agency of the Federal government), such a classification would not be impermissible. Legislative classifications for tax purposes are given wide respect in the face of constitutional challenges. *Beals* v. *Commissioner of Corps. & Taxation,* Mass. , (1976).[d] *Mary C. Wheeler School, Inc.* v. *Assessors of Seekonk,* Mass. , - (1975).[e] *Weinstock* v. *Hull,* Mass. , (1975).[f] *Frost* v. *Commissioner of Corps. & Taxation,* 363 Mass. 235, 248, appeal dismissed for want of substanial Federal question, 414 U.S. 803 (1973). *Austin* v. *New Hampshire,* 420 U.S. 656, 661-662 (1975). *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356, 359-365 (1973). *Madden* v. *Kentucky,* 309 U.S. 83, 87-88 (1940).

The fact that the deduction allowed to a Federal savings and loan association is determined by a Federal agency decision concerning reserve requirements is not an unconstitutional delegation of legislative powers in violation of arts. 23 and 30 of the Declaration of Rights of the Constitution of the Commonwealth. This is not a case in which some future Federal law or regulation purportedly is accepted by the Legislature as the law of the Commonwealth. *Opinion of the Justices,* 239 Mass. 606, 612 (1921). In numerous instances a taxpayer's obligation is affected by the conduct of other persons, but those other persons are not exercising the authority of the Legislature to tax. Their action may influence the amount of the tax payable, but the taxing power has not been delegated to them.

The excise imposed by § 11 does not violate the requirement of art. 44 of the Amendments to the Constitution of

[d] Mass. Adv. Sh. (1976) 2053, 2059.

[e] Mass. Adv. Sh. (1975) 2311, 2314-2315.

[f] Mass. Adv. Sh. (1975) 531, 536.

the Commonwealth that taxes "be levied at a uniform rate . . . upon incomes derived from the same class of property." The rate is uniform. The amount of allowable deductions will vary among taxpayers for a variety of reasons, including differences in deductions for contributions to surplus or the guaranty fund. That fact does not make the rate other than uniform. If the associations are placed in a separate classification, and, as we have said, the statute itself makes no such classification, such a classification does not violate art. 44. See *Barnes* v. *State Tax Comm'n,* 363 Mass. 589, 594 (1973).

6. We come then to the second contention of the associations that, because of unfair discrimination, the excise violates 12 U.S.C. § 1464(h) (1970). The excise does not apply to credit unions. From this, the associations argue that the excise is invalid because it is not imposed "on other similar local mutual or cooperative thrift and home financing institutions." There is no question that a credit union is a "local mutual or cooperative thrift and home financing institution." See G.L. c. 171, § 2. The issue is whether a credit union is "similar" to a Federal savings and loan association within the meaning of § 1464(h).

Where the question has been presented, credit unions have been regarded as not similar to Federal savings and loan associations. See *First Fed. Sav. & Loan Ass'n* v. *Connelly,* 142 Conn. 483, 492 (1955), appeal dismissed for want of a substantial Federal question, 350 U.S. 927 (1956) (involving a similar claim under § 1464[h]); *State* v. *Minnesota Fed. Sav. & Loan Ass'n,* 218 Minn. 229, 239-241 (1944); *Manchester Fed. Sav. & Loan Ass'n* v. *State Tax Comm'n,* 105 N.H. 17, 19-21 (1963) (involving a similar claim under § 1464[h]).

The associations argue that this is a question of Federal law and that Massachusetts credit unions are not different.

We have held that a Massachusetts coöperative bank is similar to a Federal savings and loan association because "[b]oth appeal to the same type of investor and to the same class of borrowers," and because such institutions "are in direct competition with each other." *Commissioner of Corps. & Taxation* v. *Flaherty,* 306 Mass. 461, 462 (1940), cert. denied, 312 U.S. 680 (1941). Later we held that Massachusetts savings banks are similar to Federal savings and loan associations. *Springfield Inst. for Sav.* v. *Worcester Fed. Sav. & Loan Ass'n,* 329 Mass. 184, 185, cert. denied, 344 U.S. 884 (1952).

There are significant differences between credit unions chartered in Massachusetts and Federal savings and loan associations located in Massachusetts. The test for similarity is not what each type of institution might do but rather what each does in fact, although we note that credit unions have greater restrictions imposed on them than the other institutions.[9] On this record similarity has not been

[9] In the District Court proceedings in *United States* v. *State Tax Comm'n,* 348 F. Supp. at 400, the judge concluded that the omission of credit unions from the excise was proper because there were "enough statutory differences between the powers, functions and legislative policy behind the creation of credit unions, savings banks, cooperative banks, and savings and loan associations . . . to justify the exclusion of credit unions from the excise." He ruled that there was a lack of similarity for the purposes of § 1464(h) because of "different treatment of credit unions in the nature, powers and duties and purposes of credit unions as contrasted with . . . [the other institutions]."

The major statutory differences are in the power to make loans and in the details of the loans permitted. Compare G.L. c. 171, § 2 (purposes of a credit union are accumulating and investing savings of members and making loans to them for provident purposes), with 12 U.S.C. § 1464(a) (1970) (purposes of Federal savings and loan associations are to provide places where people may invest their funds "in order to provide for the financing of homes . . . "). Compare also G.L. c. 171, §§ 24(A), 24(B)(*a*)(4), 24(B)(*b*)(7), 24(B)(*b*)(8), with 12 U.S.C. § 1464(c) (1970),

established so as to make the excise invalid because it does not apply to credit unions. Credit unions, unlike the other institutions, must give preference to personal loans, particularly to smaller loans, and may make loans only to members. G.L. c. 171, § 24. Although credit unions are authorized to make loans secured by first mortgages on real estate, in practice they invest a far lesser proportion of their funds in real estate mortgage loans than do the institutions subject to the excise. In 1972, the latest year for which complete statistics are shown in the record, credit unions placed 30.1% of their total investments (in dollars) in real estate mortgages. Federal savings and loan associations had 87.7% of their total investments (in dollars) in real estate mortgages. The comparable figure for Massachusetts coöperative banks was 80.4% and for Massachusetts savings banks, 65.3%. Analyzed solely in terms of the distribution (in dollars) of loans between personal loans and real estate loans, the disparity is even more marked. Federal savings and loan associations had almost 98% of their total loans in real estate mortgages; coöperative banks had over 97% of their total loans in real estate mortgages; savings banks had over 95% of their total loans in real estate mortgages. Credit unions, on the other hand, had only about 42% of their total loans in real estate mortgages.

The associations have not shown that credit unions compete substantially with Federal savings and loan associations for the same types of investors and the same class of borrowers. Nor have they shown the extent, if any, to which credit unions and Federal savings and loan associations are in direct competition with each other. See *Com-*

as amended, 12 U.S.C. § 1464(c) (Supp. IV, 1974). The authority of credit unions to make loans on real estate mortgages has recently been enlarged. See St. 1977, cc. 20, 22 (effective June 2, 1977).

missioner of Corps. & Taxation v. *Flaherty*, 306 Mass. 461, 462 (1940). We do not reach the question whether any or all of the associations would be entitled to relief if it were shown that one Federal association was in substantial competition with one or more credit unions. The proper method of measuring similarity may be a collective, rather than an individual, comparison.

7. A declaratory judgment shall be entered in the Superior Court consistent with this opinion.

So ordered.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

No. 641

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON & others,
Appellants

v.

STATE TAX COMMISSION & another,
Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that First Federal Savings and Loan Association of Boston; Boston Federal Savings and Loan Association; Colonial Federal Savings and Loan Association; Security Federal Savings and Loan Association of Brockton; Second Federal Savings and Loan Association; Freedom Federal Savings and Loan Association (formerly First Federal Savings and Loan Association of Worcester); Union Federal Savings and Loan Association of Boston; Metropolitan Federal Savings and Loan Association (merged into Metropolitan Savings Bank

which in turn merged into Union Warren Savings Bank); Bay State Federal Savings and Loan Association; First Federal Savings and Loan Association of Fall River; First Federal Savings and Loan Association of Cape Cod; First Federal Savings and Loan Association of Lowell; Family Federal Savings and Loan Association (formerly Fitchburg Federal Savings and Loan Associations); Natick Federal Savings and Loan Association; Union Federal Savings and Loan Association; Plymouth Federal Savings and Loan Association; Revere Federal Savings and Loan Association; Middlesex Federal Savings and Loan Association; Winter Hill Federal Savings and Loan Association; Waltham Federal Savings and Loan Association; Mutual Federal Savings and Loan Association of Whitman; First Federal Savings and Loan Association of Attleboro; Edward Everett Federal Savings and Loan Association; Scituate Federal Savings and Loan Association; Milford Federal Savings and Loan Association; Monument Federal Savings and Loan Association; Leader Federal Savings and Loan Association; Foxboro Federal Savings and Loan Association; People's Federal Savings and Loan Association; Bay Colony Federal Savings and Loan Association; Montello Federal Savings and Loan Association of Brockton (merged into Home Federal Savings and Loan Association); Home Federal Savings Association; Home Owners Federal Savings and Loan Association; and Northeast Federal Savings and Loan Association (merged into First Federal Savings and Loan Association of Worcester, now named Freedom Federal Savings and Loan Association), plaintiffs in the above-captioned case, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered in this action on May 3, 1977, ordering that a declaratory

judgment be entered in the Superior Court for the County of Suffolk.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Chester M. Howe
Chester M. Howe
Counsel for Appellants

[As filed July 20, 1977.]

Appendix C.

MASSACHUSETTS GENERAL LAWS, CHAPTER 63, SECTION 11:

Every savings bank as defined in chapter one hundred and sixty-eight, every co-operative bank as defined in chapter one hundred and seventy and every state or federal savings and loan association located in the commonwealth shall pay to the commissioner an annual excise equal to the following:

(*a*) on or before the twenty-fifth day of the seventh month of the taxable year, there shall be paid (1) six hundred twenty-seven one thousandths per cent of a reasonable estimate of its net operating income, as hereinafter defined, for the taxable year . . .;

(b) on or before the twenty-fifth day of the first month following the close of the taxable year, there shall be paid (1) one and two hundred fifty-four one thousandths per cent of its net operating income, as hereinafter defined, for the taxable year, less the estimated amount previously paid with respect to such income . . . .

For the purpose of this section, "net operating income" shall mean gross income from all sources, without exclusion, for the taxable year, less (*i*) operating expenses, (*ii*) net losses upon assets sold, exchanged or charged off as uncollectible during the taxable year, and (*iii*) minimum additions during the taxable years to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities; and "taxable year" shall mean any fiscal or calendar year or period for which the bank is required to make a return to the federal government. Federal and state taxes paid or accrued during the taxable year shall not be deductible in computing "net operating income".

Amended by St. 1971, c. 555, § 26; St. 1975, c. 684, § 44.

Appendix D.

COMPARISON OF STATUTORY POWERS OF FEDERAL SAVINGS & LOAN ASSOCIATIONS, MASSACHUSETTS CREDIT UNIONS, MASSACHUSETTS COOPERATIVE BANKS AND MASSACHUSETTS SAVINGS BANKS

	Federal Savings & Loan Associations	Mass. Credit Unions [1] ref: Mass. G.L. c. 171	Mass. Cooperative banks ref: Mass. G.L. c. 170	Mass. Savings Banks ref: Mass. G.L. c. 168
I. DEPOSITS				
Maximum value of shares and/or savings deposits (exclusive of interest) which may be held by one person in one account.[2]	No Limit [3]	$25,000	$100,000 [4]	$100,000 [5]
Reference		§10	§16	§21(1)
II. INTEREST/DIVIDENDS				
Maximum interest or dividends payable on shares and/or savings deposits (excluding time deposits) after required allocation to guaranty or reserve fund.	5¼ percent	8 percent until guaranty fund equals 15 percent of assets	5¼ percent	5¼ percent
Reference	12 C.F.R. §526.3	§25	Mass. G.L. c. 167 §18B, Reg. of Mass. Com'r of Banks published 10/29/70	Mass. G.L. c. 167 §18B, Reg. of Mass. Com'r of Banks published 10/29/70

NOTES:

[1] Assumes assets of over $4,000,000 and membership in Massachusetts Credit Union Share Insurance Corp. or insurance in full under federal or state law.

[2] Exceptions to these limits are made for deposits of state and municipal funds, charitable organizations, pension trust funds, etc.

[3] Deposits of over $40,000, however, are not insured by Federal Savings and Loan Insurance Corporation. 12 U.S.C. §1728(a).

[4] One person may hold no more than 300 serial shares and no more than the combined total of 1,000 paid up and saving shares in the denomination of $100 or half the foregoing amounts if the denomination is $200.

[5] One person may hold up to $40,000 in a savings account and an amount in a term deposit account such that the aggregate of all his accounts does not exceed $100,000 exclusive of interest.

	Federal Savings & Loan Associations	Mass. Credit Unions [1] ref: Mass. G.L. c. 171	Mass. Cooperative banks ref: Mass. G.L. c. 170	Mass. Savings Banks ref: Mass. G.L. c. 168
III. REQUIRED GUARANTY OR RESERVE FUND				
Minimum guaranty or reserve fund required by statute.[6]	5 percent of deposits [7]	15 percent of assets	10 percent of assets	7½ percent of deposits
Reference	12 C.F.R. §563.13	§19	§38	§58
IV. LENDING LIMITS				
A. First Lien Mortgage Real Estate Loans				
1. Out-of-state real estate falling within statutory lending area	Within 100-mile radius of home office	Within 35-mile radius of credit union office	Within town, closest point of which is within 50 miles of town in which main office of lender is located.	Within town, closest point of which is within 50 miles of town in which home office of lender is located.[8]
Reference	12 U.S.C. §1464(c)	§24(B)(b)(4)	§23	§34(2)

NOTES:

[6] In each case, the applicable statute or regulation allows an institution to meet this requirement over a period of time by setting aside a portion of its earnings each year until the required fund has accumulated.

[7] Article 10 of the charter prescribed by the Federal Home Loan Bank ("FHLB") requires the accumulation of a capital reserve equal to 10% of deposits (12 C.F.R. §544.1); however, the FHLB has authorized this requirement to be stricken from charters (12 C.F.R. §544.8). Consequently, the sole remaining reserve requirement is the requirement to accumulate an insurance reserve until it equals 5% of deposits (12 C.F.R. §563.13).

[8] Investment in out-of-state mortgages within the lending area is limited to 25% of deposits if such mortgages are not insured by a governmental agency or to 35% of deposits if 15% of the mortgages are so insured.

	Federal Savings & Loan Associations	Mass. Credit Unions [1] ref: Mass. G.L. c. 171	Mass. Cooperative banks ref: Mass. G.L. c. 170	Mass. Savings Banks ref: Mass. G.L. c. 168
IV. A. (Continued)				
2. Permitted investments in real estate mortgages outside lending area.	(a) *40 percent of assets* [9] or (b) *no limit* if insured by agency of U.S. Government	None permitted	25 percent of deposits if FHA or VA insured	lesser of book value of loans within lending area or 37½ percent of deposits if FHA or VA insured
References	12 U.S.C. §1464(c)	§24(B)(b)(4)	§24A	§35(11)
B. Maximum Investments in First Lien Real Estate Loans				
1. Total investments in first lien real estate mortgages.	95 percent of deposits [10]	80 percent of shares, deposits guaranty fund, reserve fund and undivided earnings	93½ percent of deposits [11]	90 percent of deposits [12]
References		§24(B)(b)(7)		§34(3)

NOTES:

[9] Investments equal to 20% of assets may be made in first lien real estate mortgages on improved real estate and additional investments equal to 20% of assets may be made in participating interests in such mortgages.

[10] No statutory limit is imposed on investments in first lien real estate mortgages; however, the current requirement that each federal savings and loan association maintain liquid assets equal to 5% of its total net withdrawable accounts, established by the Federal Home Loan Bank Board in 12 C.F.R. §523.11 pursuant to authority granted in 12 U.S.C. 1425a(b), precludes investment of this amount in such mortgages.

[11] No statutory limit is imposed on investments in first lien real estate mortgage; however, the requirement that each Massachusetts cooperative bank maintain a liquidity reserve equal to 6 1/2% of its share liability, imposed by Mass. G.L. c. 170, §40, precludes investment of this amount in such mortgages.

[12] A Massachusetts savings bank may invest an amount equal to 75% of its deposits in uninsured or unguaranteed first lien real estate mortgage loans plus an additional amount equal to 15% of its deposits in insured or guaranteed mortgages.

	Federal Savings & Loan Associations	Mass. Credit Unions [1] ref: Mass. G.L. c. 171	Mass. Cooperative banks ref: Mass. G.L. c. 170	Mass. Savings Banks ref: Mass. G.L. c. 168
IV. B. (Continued)				
2. Maximum individual loan secured by one parcel improved residential real estate (4 families or less and owner occupied)				
(a) Maximum amount of one loan	$55,000	$40,000	$60,000 or 5 percent of guaranty fund, whichever is greater	$50,000 or 1¼ percent of deposits, whichever is greater
References	12 U.S.C. §1464(c)	§24(B)(b)(8)	§24(4)	§35(4)
(b) Maximum amount as percent of fair market value of collateral as determined by investment committees	80 percent if authorized by members [13]	80 percent [14]	80 percent if loan for $60,000 or less; 70 percent if loan for more than $60,000	80 percent [15]
References	12 C.F.R. §545.6-1(a)(i)	§24(B)(a)(3)	§24(3)	§35(4)

NOTES:

[13] 90% and 95% loans are authorized if the maximum amounts of the loan are $36,000 and $30,000 respectively. Greater percentages and longer terms are available if the loans are guaranteed or insured. 12 C.F.R. §545.6-1.

[14] 90% loans are authorized if real estate is for one or two-family residence, the term is 25 years and the maximum amount of the loan is $30,000. §24(B)(a)(4).

[15] 90% loans are authorized if the term of the loan is 25 years.

	Federal Savings & Loan Associations	Mass. Credit Unions [1] ref: Mass. G.L. c. 171	Mass. Cooperative banks ref: Mass. G.L. c. 170	Mass. Savings Banks ref: Mass. G.L. c. 168
IV. B. 2. (Continued)				
(c) Maximum term if fully amortized	30 years	30 years	30 years	35 years
References	12 C.F.R. §545.6-1(a)(i)	§24(B)(a)(3)	§24(2)	§35(4)
C. Maximum Investments in Mortgage Participation Loans [16]	20 percent of assets (insured or guaranteed loans not subject to this limitation)	5 percent of shares, deposits guaranty fund, reserve fund and undivided earnings	20 percent of deposits	20 percent of deposits
References	12 C.F.R. §545.6-7 (c)(1)(iv)	§24(B)(a)(6)	§23(4)	§35(8)
D. Unsecured Personal Loans				
1. Maximum investment in unsecured loans	20 percent of assets [17]	95 percent of assets [18]	10 percent of first $50,000,000 of deposits plus 5 percent of balance of deposits [20]	10 percent of first $50,000,000 of deposits plus 5 percent of balance of deposits [21]
References	12 C.F.R. §545.8	§21 [19]	§26(8)	§37

NOTES:

[16] Loan must be one that the participating lender could have made itself.

[17] Loan must be for repairing, alteration or improvement of real property.

[18] Massachusetts credit unions must give preference to small personal loans. §24. Investments in other than personal loans require approval of the directors. §21.

[19] Requires that at least 5 percent of the total assets of a credit union shall be carried as cash on hand or invested in specified ways.

[20] These lending limits assume bank has assets of at least $5,000,000.

[21] The Massachusetts Commissioner of Banks may waive the 10 percent limitation upon application to permit aggregate loans not to exceed 12 percent of deposits. §37.

	Federal Savings & Loan Associations	Mass. Credit Unions [1] ref: Mass. G.L. c. 171	Mass. Cooperative banks ref: Mass. G.L. c. 170	Mass. Savings Banks ref: Mass. G.L. c. 168
IV. D. (Continued)				
2. Maximum individual loan	$10,000 [17]	$1,500	$4,500 [20]	$6,000
References	12 C.F.R. §545.8(a)(1)(i)	§24(A)(1)	§26(8)	§37
3. Term	15 years [17]	36 months	No limit [20]	No limit
References	12 C.F.R. §545.8(a)(1)(v)	§24(A)	§26(8)	
V. OTHER INVESTMENTS				
1. U.S., state and municipal obligations (including obligations of selected agencies there of).	permitted	permitted	permitted	permitted
References	12 C.F.R. §545.9(e)	§21	§26	§§42, 43
2. Banker's acceptances	not permitted	permitted	permitted	permitted
References	12 C.F.R. §545.9(a)	§21	§26(4A)(c)	§49(2)
3. Deposits in other banks	restricted	permitted	permitted	permitted
References	12 C.F.R. §545.9(a), §545.9-2	§21	§26	§55
4. Listed Securities	not permitted	permitted to extent authorized for savings banks	permitted to extent authorized for savings banks	debt obligations of railroad, telephone, public service

NOTES:

See preceding page.

	Federal Savings & Loan Associations	Mass. Credit Unions [1] ref: Mass. G.L. c. 171	Mass. Cooperative banks ref: Mass. G.L. c. 170	Mass. Savings Banks ref: Mass. G.L. c. 168
V. 4. (Continued)				corporations, stock of banks and insurance companies and other investments on annual legal list, are permitted investments [22]
References	12 C.F.R. §545.9	§21	§26(2) and (2A)	§§44-49, 51
5. Maximum investments in office building	not without prior Federal Home Loan Bank Board approval if aggregate book value of existing such investment exceeds 25% of association's net worth	not in excess of guaranty and other surplus accounts, subject to approval of Mass. Comm'r of Banks	not in excess of guaranty fund, surplus account and unallocated reserves or 3½ percent of assets, whichever less	25 percent of guaranty and surplus fund
References	12 C.F.R. §545.10	§21	§30	§53(1)

NOTES:

[22] To invest in these securities, the bank must have assets of over $5,000,000.

Appendix E.

UNITED STATES of America et al.,
Plaintiffs-Appellees,
v.
STATE TAX COMMISSION et al.,
Defendants-Appellants.

UNITED STATES of America et al.,
Plaintiffs-Appellees,
v.
STATE TAX COMMISSION et al.,
DEFENDANTS-APPELLEES.

First Federal Savings and Loan Association of Boston et al., Intervenors-Appellants.

Nos. 72-1380, 72-1381.

United States Court of Appeals,
First Circuit.

Argued March 8, 1973.

Decided June 28, 1973. [963]

Before COFFIN, Chief Judge, McENTEE and CAMPBELL, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

These appeals question the validity of Massachusetts taxes [1] on the deposits and [965] income of federal savings and loan associations (hereinafter "federal associations").

[1] The taxes are imposed by M.G.L. c. 63, § 11, which reads as follows:

"Every savings bank as defined in chapter one hundred and sixty-eight, every co-operative bank as defined in chapter one hundred and seventy and every state or federal savings and loan association located in the commonwealth shall pay to the commissioner an annual excise equal to the following:

(a) on or before the twenty-fifth day of the seventh month of the taxable year, there shall be paid (1) one-half of one per cent of a reasonable estimate of its net operating income, as hereinafter defined, for the taxable year, and (2) one-twentieth of one per cent of the average amount of its deposits or of its savings accounts and share capital for the first six months of the taxable year, after deducting from such average amounts (i) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (ii) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by this commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of this commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of such sixth-month period; and

(b) on or before the twenty-fifth day of the first month following the close of the taxable year, there shall be paid (1) one per cent of its net operating income, as hereinafter defined, for the taxable year, less the estimated amount previously paid with respect to such income, and (2) one-twentieth of one per cent of the average amounts of its deposits or of its savings accounts and share capital for the second six months of the taxable year, after deducting from such average amount (i) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (ii) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by this commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of this commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of the taxable year.

For the purpose of this section, 'net operating income' shall mean gross income from all sources, without exclusion, for the taxable year, less (i) operating expenses, (ii) net losses upon assets sold, exchanged or charged off as uncollectible during the taxable year, and (iii) minimum additions during the taxable years to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities; and 'taxable year' shall mean any fiscal or calendar year or period for which the bank is required to make a return to the federal government. Federal and state taxes paid or accrued during the taxable year shall not be deductible in computing 'net operating income'."

In No. 72-1380, the United States seeks a declaration that the deposits tax, § 11(a)(2)(ii) and (b)(2)(ii), violates § 5(h) of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(h).[2] The United States objects to the deduction for loans secured by mortgage of out-of-state real estate "within a radius of fifty miles of the main office" of a particlar bank. M.G.L. c. 63 § 11(a)(2)(ii) and (b)(2)(ii). It contends that the 50-mile limitation causes a "greater" tax upon the federal associations than upon other similar state-chartered banks in violation of § 5(h) because the federal associations, unlike state banks, are empowered by controlling federal law to make out-of-state loans on real estate beyond a 50-mile radius and hence get no deduction for loans beyond that limit. We agree with the district court that the challenged deduction results in an

[2] "No State, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

illegal disparity of tax treatment between federal and local banks.

In No. 72-1381, six federal associations challenge the income tax, § 11(a)(1) and (b)(1) on grounds that it violates § 5(h) and various state and federal constitutional provisions. The United States has not joined in this challenge. We conclude, under equitable principles which federal courts normally apply to tax litigants other than the United States, that declaratory relief should have been denied without consideration of the merits.

I. *No. 72-1380 (the Deposits Tax)*

The United States, on behalf of the Federal Home Loan Bank Board, brought a complaint seeking a declaration that § 11(a)(2)(ii) and (b)(2)(ii) (the deposits tax) contravenes § 5(h) and the Supremacy Clause of the federal Constitution.[3] Six federal associations were permitted to intervene and joined in the attack on the deposits tax, contending also that the deposits tax violates the Commerce Clause. They raised other issues, which are the subject of the appeal in No. 72-1381.

On plaintiffs' motions for summary judgment, the district court ruled that the deposits tax violates § 5(h) and the Supremacy Clause because it

> operates in a very real way to bring intense economic pressure to bear on federally chartered banks which it does not bring to bear in any meaning-[966] ful way on state chartered banks because of the fact that

[3] Jurisdiction was founded on 28 U.S.C. § 1345. The United States has standing to sue on behalf of its instrumentalities. *See* United States v. Arlington County, 326 F.2d 929, 931 (4th Cir. 1964); Dept. of Employment v. United States, 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966). It is not disputed that the Home Loan Bank Board, established by Congress as an independent agency with responsibility for the savings and loan system, 12 U.S.C. §§ 1437, 1464, is a federal instrumentality.

> other state legislation severely restricts state chartered banks from making any substantial amount of loans in non-exempt areas.

The court also ruled that the deposits tax interferes with the federal associations' ability to carry out congressional purpose and policies in the lending of money, and that it constitutes "an unreasonable burden on the circulation of loans for home improvements in interstate commerce." United States v. State Tax Comm'n, 348 F.Supp. 397, 400 (D. Mass. 1972). It rendered an amended judgment declaring invalid § 11(a)(2) and (b)(2). The Commonwealth has appealed.

M.G.L. c. 63, § 11(a)(2)(ii) and (b)(2)(ii), as inserted by St.1966, c. 14, § 11 and amended by St.1971, c. 555, § 26, is the latest in a series of taxes on the deposits of Massachusetts savings institutions going back to St.1862, c. 224, § 4. The original deposits tax, which before 1966 was imposed solely on non-federal institutions, was litigated extensively in the 1860's; both the Massachusetts Supreme Judicial Court and the Supreme Court sustained its validity,[4] the latter having stated that a deposits tax was,

> better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contributions to the value of the privilege granted.

Society for Savings v. Coite, 6 Wall. 594, 608, 18 L.Ed. 897 (1867). A deduction for loans secured by mortgage of Massachusetts real estate taxable in the Commonwealth

[4] Commonwealth v. The People's Five Cents Savings Bank, 5 Allen 428 (1862); Commonwealth v. Provident Institution for Savings, 12 Allen 312 (1866). Provident Institution v. Massachusetts, 6 Wall. 611, 18 L.Ed. 907 (1867).

was enacted in 1881. St.1881, c. 304, § 8. Its purpose was to avoid double taxation, Massachusetts property owners being subject to local real estate taxes at full, fair cash value. Lexington Savings Bank v. Commonwealth, 252 Mass. 180, 182, 147 N.E. 569, 570 (1925). *See* M.G.L. c. 59, § 38; Bennett v. Board of Assessors of Whitman, 354 Mass. 239, 240, 237 N.E.2d 7, 9 (1968).

In 1966 Massachusetts adopted substantially the present statute, extending the deposits tax to federal associations. For the first time, the deduction for loans upon Massachusetts real estate was supplemented by a deduction for loans within a 50-mile radius on real estate in contiguous states. It is that feature which the federal associations attack as resulting in a "greater" tax upon them.[5] The statute provides for a tax of one-twentieth of one percent upon average deposits and share capital after deducting (i) the bank's real estate used for banking purposes; (ii) the unpaid balances on loans secured by "mortgage of real estate taxable in this commonwealth, or . . . in a state contiguous . . . within a radius of fifty miles of the main office of such bank or association." The deduction is further qualified by a "grandfater clause" deduction allowing a bank or association not previously subject to tax to deduct the unpaid balance on loans secured by real estate outside Massachusetts which were outstanding at the time the tax statute was enacted in 1966.

The federal associations are federally created banks. *Cf.* First Agricultural National Bank of Berkshire County v. State Tax Commission, 392 U.S. 339, 340, 88 S.Ct. 2173,

[5] The federal associations' out-of-state real estate loan area had been increased by Congress in 1964, two years before the present Massachusetts tax statute was enacted, from 50 to 100 miles, with no requirement that the real estate be in a "contiguous" state. *See infra.* The local institutions, in 1966 as now, could not loan on out-of-state real estate beyond, at most, 50 miles. *See infra.*

20 L.Ed.2d 1138 (1968). Chartered and regulated by the Federal Home Loan Board under author-[967] ity conferred in the Federal Home Owners' Loan Act, 12 U.S.C. § 1464, they serve the statutory purpose of providing "local mutual thrift institutions in which people may invest their funds and . . . for the financing of homes." § 1464(a). The latter purpose, described more broadly as the "preservation of home owners and the promotion of a sound system of home mortgage," has been said to affect the welfare of the nation as a whole. First Federal Savings and Loan Association v. Loomis, 97 F.2d 831, 840 (7th Cir. 1938), cert. granted, 305 U.S. 564, 59 S.Ct. 92, 83 L.Ed. 355 (1938); dismissed on motion of counsel for petitioners sub nom. Martin v. First Federal Savings & Loan Ass'n, 305 U.S. 666, 59 S.Ct. 363, 83 L.Ed. 432 (1938). *See* Fahey v. O'Melveny, 200 F.2d 420 (9th Cir. 1952), cert. denied sub nom. Willhoit v. Fahey et al., 345 U.S. 952, 73 S.Ct. 866, 97 L.Ed. 1374 (1953).

The federal associations are closely affiliated with their district federal home loan bank (there are twelve nationally), which may provide them credit. The chairman of the Home Loan Bank Board states in an affidavit that the 4500 savings and loan associations in the nation are "the major mortgage lenders on residential properties," playing "the key role in the housing market" and providing "the largest, most stable source of funds for housing." They hold "44% of all outstanding home mortgages" and serve to promote the national housing policy "to provide for the economical financing of home ownership . . . by facilitating to the extent possible the inter-regional flow of mortgage funds from capital surplus areas to nationwide housing markets located in capital shortage areas."

The federal associations are allowed to "lend their funds only on the security of their savings accounts or on the

security of first liens upon real property within one hundred miles of their home office or within the State in which such home office is located. . . .'' § 5(c). The area limit was so extended from 50 to 100 miles by the Housing Act of 1964, Title IX, Pub.L. 88-560, § 901(a), 78 Stat. 804. The accompanying House Committee report stated:

> The present 50-mile limitation was placed in the statute more than 25 years ago. In the intervening years, the country has experienced a tremendous suburban expansion, the establishment of new road systems and mass transit so that the commuting distance and metropolitan areas have been constantly enlarged. In recognition of these changes, your committee feels that the statutory lending area . . . should be 100 miles. . . .

1964 U.S. Code Cong. and Adm. News, p. 3442. The federal associations are also allowed to make certain investments outside the prescribed geographical areas. *See*, e.g. § 5(h), 12 C.F.R. § 545.6-4.

The ''similar local'' Massachusetts institutions purportedly favored by the area limitation in the deduction provisions of M.G.L. c. 63, § 11 are the savings banks (c. 168), the co-operative banks (c. 170), the savings and loan associations (c. 93, § 34) and the credit unions (c. 171). Excepting the credit unions, the similarity of which is disputed, all are conceded to be ''similar'' to the federal associations. *See* Comm'r of Corporations and Taxation v. Flaherty, 306 Mass. 461, 28 N.E. 2d 433 (1940) (co-operative banks similar).

Massachusetts banks are restricted to real estate loans within the state, and within states contiguous to Massachusetts if such loans are not more than 50 miles from the home office in the case of savings banks, and 25 in that of co-

operatives.[6] Section 34 of M.G.L. c. 93 [968] gives the commissioner of banks the same powers and duties over savings and loan associations as he has over savings banks; the district court inferred from this section that the same restrictions on lending area apply to both kinds of banks. The banks may loan upon security outside the restricted area if the loans are VA or FHA-insured. M.G.L. c. 168, § 35(11); c. 170 § 24A.

The district court found, and we concur, that the area limitation in the deduction provision of the deposits tax results in a violation of § 5(h). It also found a violation of the Supremacy Clause, and appellees further claim a violation of the Commerce Clause. We prefer, however, to rest our decision upon the statutory rather than the constitutional grounds.

It is true that the federal associations, being federal instrumentalities, are immune from state taxation by vir-

---

[6] SAVINGS BANKS.

> ''Any such corporation may make . . . loans upon real estate secured by first mortgages.'' M.G.L. c. 168 § 34, first para.
>
> ''Such first mortgages shall be on real estate located in the commonwealth, or in a city or town of a state contiguous to the commonwealth, provided, that such city or town is not more than fifty miles from the town in which the main office of such corporation is located. . . .'' § 34(2).

CO-OPERATIVE BANKS.

> ''Any such corporation may make . . . loans of the following types, upon real estate situated in the commonwealth or situated in a state contiguous to the commonwealth and within a radius of twenty-five miles of the main office of such corporation. . . .'' M.G.L. c. 170 § 23.

Formerly, Massachusetts banks could lend only within the state. *See* M.G.L. c. 168 § 54 (Ter. ed. 1932), c. 170 § 23 (Ter. ed. 1932). In the case of savings banks, the lending limit was first extended by St.1946, c. 256 § 1 to contiguous-state loans within 25 miles, and then by St. 1955, c. 432 § 34(2) to such loans within 50 miles. The co-operatives' limit was extended to contiguous-state loans within 25 miles by St.1950, c. 371, § 23.

tue of the Supremacy Clause, absent specific Congressional authorization. McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819); Agricultural Bank v. Tax Comm'n, *supra*, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed. 1138. *See* Helvering v. Gerhardt, 304 U.S. 405, 411, 58 S.Ct. 649, 82 L.Ed. 1091 (1938). However, since § 5(h) permits states to tax federal associations, the question is not whether Massachusetts may tax but whether its tax conforms to the statute. Obviously, § 5(h) is to be read in light of the purposes of the Home Owners' Loan Act, and with awareness of the objects of the Supremacy and Commerce Clauses; but we see the latter as providing more a frame of reference than as separate grounds for decision.

The Supreme Court has said that § 5(h) "unequivocally bars discriminatory state taxation of the Federal Savings and Loan Associations." Laurens Federal Savings & Loan Ass'n v. South Carolina Tax Commission, et al., 365 U.S. 517, 523, 81 S.Ct. 719, 722, 5 L.Ed. 2d 749 (1961). Otherwise the Court has not had occasion to interpret the clause. However, the Court has said that a similar clause, 12 U.S.C. § 548, permitting state taxation of national banks,[7] is meant "to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class.'" Michigan Nat'l Bank v. Michigan, 365 U.S. 467, 473, 81 S.Ct. 659, 662, 5 L.Ed. 2d 710 (1961), quoting Tradesmens Nat'l Bank v. Oklahoma Tax Comm'n, 309 U.S. 560, 567, 60 S.Ct. 688, 84 L.Ed. 947 (1940). In *Michigan* the Court also said that the states may not "create 'an unequal and unfriendly competition' with national banks," and that "we are taught that in determining the burden of the tax—its discrimina-

[7] "(b) In the case of a tax on . . . shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: . . ."

tory character—we look to its *effect*, not its *rate*." 365 U.S. at 473, 475, 81 S.Ct. at 662, 663.

Figures stipulated in the district court show that the 50-mile deduction limit discriminates in "practical operation" and in "effect" against the federal associations. We are not persuaded by Massachusetts' contrary marshalling of [969] the figures. Massachusetts relies on the fact that from 1966-70 the total real estate loan deductions available to federal associations actually comprised a greater percentage of deposits than did deductions available to local institutions. But these figures do not separate out the impact of the "grandfather clause" deductions which are, of course, of diminishing and temporary benefit to the federal associations. (The latter characteristics are reflected in figures showing that the percentage of federal associations' deposits not offset by a deduction has risen from 8.7% to 28.6% since 1966.) After allowance is made for the grandfather clause component, the percentage of deductions to deposits is significantly lower for the federal associations than for the local banks. The federal associations make about 44% of their loans on security of real property outside the 50-mile area. The local institutions make only about 15% of the loans on outside property.[8] We conclude that but for the grandfather clause, the federal associations would have received a substantially lesser deduction against deposits in the 1966-70 period and would have paid a greater tax.

It can be argued that the federal banks are not required to loan on real estate beyond 50 miles. But this argument conflicts with the purposes of the Home Owners' Loan Act as interpreted in light of the Supremacy

[8] The deposits of local institutions are not wholly offset by deductible loans since they may invest in VA and FHA-insured real estate loans outside the 50-mile area, and may make non-real estate loans.

and Commerce Clauses. The federal associations and their conferred powers are part of a Congressional scheme, national in scope, to provide a greater supply and flow of funds for home financing. The associations' authority to lend on real estate within a 100-mile area is part of this distinctively federal answer to a national problem. The Congressional aim may not be stultified by state taxation penalizing federal associations at precisely the point they exercise the greater flexibility conferred by their federal franchise. While the local banks may think it fair to obtain relief from competition in areas foreclosed to them, the housing public is entitled to receive the untrammeled benefit of the wider powers. If the federal associations can achieve tax equality only by restricting their lending areas, the tax is discriminatory.

Moreover, the history of the Massachusetts tax statute suggests that the area limitation was designed to create "an unequal and unfriendly" competition. We perceive no reason—other than the impermissible one of sheltering local institutions—for adoption in 1966 of the 50-mile contiguous-state area limitation. It was then apparent that federal associations could loan more widely; indeed the grandfather clause reflected full awareness of the fact. Federal associations are entitled not to be singled out for special tax burdens; and it makes no difference whether the latter are expressly written into the statute or are tailored, as here, more subtly.[9]

We hold that § 11(a)(2)(ii) and (b)(2)(ii) create a discriminatory deduction which results, within the mean-

[9] If we assume the deduction on out-of-state loans was intended to avoid double taxation, thus placing Massachusetts banks on a parity with out-of-state banks in competing for out-of-state loans, the present tax imposes double taxation on home owners borrowing from the federal associations beyond the exempt areas. Again, the result points to discrimination rather than to promotion of some neutral object.

ing of § 5(h), in a "greater" tax upon the federal associations than upon "other similar" local institutions. We do not attempt to resolve the further argument, raised by the intervenors and rejected by the district court, that the tax also violates § 5(h) because not imposed upon credit unions, said to be "other similar" local institutions. The district court ruled that a credit union was not such a ". . . similar local mutual or cooperative thrift and home financing institution" within § 5(h). *See* Man- [970] chester Federal Savings and Loan Ass'n v. State Tax Comm'n, 105 N.H. 17, 191 A. 2d 529 (1963); First Fed. Sav. and Loan Ass'n v. Connelly, 142 Conn. 483, 115 A.2d 455 (1955); State v. Minnesota Fed. Sav. and Loan Ass'n, 218 Minn. 229, 15 N.W.2d 568 (1944). The credit union argument is not advanced by the United States; it is raised only by the intervenor federal associations. Apart from its being unnecessary to our ruling on the deposits tax, we decline to consider it for reasons set forth below in our discussion of the income tax.

The Commonwealth argues that, if we find the deduction provision invalid, we leave the tax undisturbed and strike only the deduction. The only question before us, however, is whether the deposits tax as it applies to the federal associations is invalid. To declare invalid only the deductions portion of the tax on the federal associations would result in an even greater discrimination upon them than now occurs.

The judgment of the district court, as presently worded, appears unnecessarily broad in that it would invalidate the deposits tax on local as well as federal institutions. We remand with instructions to the district court to modify paragraph (1) of its present judgment and decree to read as follows:

> "Massachusetts General Laws, Chapter 63, Section 11(a)(2) and Section 11(b)(2) are invalid and unen-

forceable as applied to Federal Savings and Loan Associations because said tax provisions are in conflict with and violate the provisions of Title 12, Section 1464(h), of the United States Code."

II. *No. 72-1381 (the Income Tax)*

The six federal associations appeal from the district court's refusal to grant them declaratory relief against the income tax, § 11(a)(1) and (b)(1). After the United States filed its complaint, seeking a declaration against the deposits tax, the associations moved to intervene. Their complaint joined in the attack on the deposits tax; but it further prayed, separately, for declaratory relief against § 11(a)(1) and (b)(1) on grounds that the deduction for required additions to guaranty fund or surplus ((iii), formerly (iv), of the last paragraph) constitutes an unlawful delegation under Art. IV and XXX of the Massachusetts Constitution, and that the non-includability of interest on deposits in the deduction for "operating expenses" ((i) of last paragraph) is an unconstitutional burden on interstate commerce in violation of the Commerce Clause.

The Attorney General of Massachusetts opposed the motion to intervene, contending, among other matters, that the federal associations were barred by the Tax Injunction Act (commonly referred to as the Johnson Act),[10] 28 U.S. C. § 1341, from relief in the federal court. The district court permitted intervention under F.R.C.P. 24(b). In answer to the intervenors' complaint, the Attorney General raised the affirmative defense "that the intervenors have failed to pursue the remedies available to them through the state statutory abatement procedure, suit in

[10] "The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

the state courts for declaratory relief, or other state remedy."

In its brief on motion for summary judgment, the intervenors raised two contentions not contained in the complaint: that the income tax is discriminatory in violation of § 5 (h), and that the entire § 11 violates § 5(h) because it does not cover credit unions, which the intervenors contended, are "similar . . . institutions" within the meaning of § 5(h).

The district court did not rule on the state constitutional issue raised in intervenors' complaint. It abstained from ruling on the question concerning the deduction of operating expenses because [971] of a pending proceeding before the State Tax Commission.[11] 348 F.Supp. at 401. The district court ruled that the deduction for reserve requirements does not violate § 5(h) because

> [t]here is nothing to preclude the Federal Home Loan Bank Board from altering the minimum guaranty requirements of federal savings and loan associations so as to provide a greater tax shelter to the Federal Savings and Loan associations than is allowed by the application of state law. 348 F.Supp. at 401.

It also ruled that credit unions are not similar institutions within the meaning of § 5(h). 348 F.Supp. at 400.

Appellants raise all these issues and, in addition, new issues under state and federal constitutional law. Various considerations compel us to decline to consider the intervenors' claims. Foremost is the policy against federal declaratory relief against state taxing statutes where taxpayers have adequate recourse to state courts

[11] A stipulation states: "There are pending before the Massachusetts State Tax Commission several applications for abatement filed by Massachusetts federal savings and loan associations raising the issue as to whether such deductions should be allowed."

for a determination of their claims. Great Lakes v. Huffman, 319 U.S. 293, 300-301, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943).

In *Great Lakes* the Supreme Court considered the applicability of the Johnson Act, 28 U.S.C. § 1341, to a suit for declaratory relief against a state tax. The taxpayers sought a declaration that the contribution to the state unemployment insurance fund required of them was unconstitutional. The district court held the tax constitutional, and was affirmed by the Court of Appeals, 43 F. Supp. 981 (E.D.La.1942), 134 F.2d 213 (5th Cir. 1943). The Supreme Court affirmed the judgment of dismissal, "but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of a declaratory judgment should have been denied without consideration of the merits." Great Lakes v. Huffman, *supra*, 319 U.S. at 301-302, 63 S.Ct. at 1074.

The Supreme Court did not hold that the Johnson Act itself barred declaratory judgments. Rather, its holding rested on cases antedating enactment of the Johnson Act requiring federal courts to withhold equitable relief in suits by taxpayers challenging the validity of state taxes. The Court said:

It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

"The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held

that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved." Matthews v. Rodgers, supra, 284 U.S. [521] 525, 526 [52 S.Ct. 214 at 219, 220] 76 L.Ed. 447.

The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax . . . are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court. With due re- [972] gard for these considerations, it is the court's duty to withhold such relief when . . . it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its tax. 319 U.S. at 298, 300-301, 62 S.Ct. at 1073, 1074.

The Johnson Act and *Great Lakes* reflect much the same policy respecting state tax collections as applies to federal tax collections. *See* 26 U.S.C. § 7421; Enochs v. Williams Packing Co., 370 U.S. 1, 6, 8, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962). In both instances, efficient tax collection requires that taxpayers not be able to withhold or cast doubt on taxes already or yet to be collected except through established channels. *See* Enochs v. Williams Packing Co., *supra*, 370 U.S. at 7, n. 6, 82 S.Ct. 1125. The policy is even stronger in dealing with state taxes, since the availability of broad declaratory or injunctive relief in federal courts

would promote forum shopping, inconsistent interpretation of state laws, and confusion as to the effect of such judgment on taxes already collected.

In Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), the Supreme Court reaffirmed the validity of *Great Lakes*. There, the question was whether a federal court should declare a state criminal statute unconstitutional during the pendency of criminal proceedings. Again, the Court affirmed the lower court's judgment dismissing the complaint, "but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of declaratory judgment should have been denied without consideration of the merits." 401 U.S. at 73, 91 S.Ct. at 768. The Court said:

> The continuing validity of the Court's holding in the *Great Lakes* case has been repeatedly recognized and reaffirmed by this Court. *See* e.g., Macauley v. Waterman S.S. Corp., 327 U.S. 540, 545, n. 4 [66 S.Ct. 712, 714] 90 L.Ed. 839 (1946); Ott v. Mississippi Barge Line, 336 U.S. 169, 175 [69 S.Ct. 432, 435] 93 L.Ed. 585 (1949); Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 253 [73 S.Ct. 236, 245] 97 L.Ed. 291 (1952) (Douglas, J., dissenting); Allegheny County v. Mashuda Co., 360 U.S. 185, 189 [79 S.Ct. 1060, 1063] 3 L.Ed.2d 1163 (1959); Enochs v. Williams Packing Co., 370 U.S. 1, 8 [82 S.Ct. 1125, 1129] 8 L.Ed.2d 292 (1962). Although we have found no case in this Court dealing with the application of this doctrine to cases in which the relief sought affects state criminal prosecutions rather than state tax collections, we can perceive no relevant difference between the two situations with respect to the limited question whether, in cases where the criminal proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards. In both situations deeply rooted and long-settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid.
> 401 U.S. at 71-72, 91 S.Ct. at 767.

Thus, strong authority requires federal courts to withhold declaratory relief "without consideration of the merits" where taxpayers have a "plain, adequate and complete" remedy for their grievance in state courts. Such a remedy is available here. Abatement proceedings before the State Tax Commission may be initiated under M.G.L. c. 63 § 51, made applicable to § 11 [973] taxpayers by § 18A. From there lies appeal to the Appellate Tax Board, M.G.L. c. 63 § 71, c. 58A, §§ 7, 7A, 8, and from there appeal to the Supreme Judicial Court, M.G.L. c. 58A § 13. If a decision from the Tax Commission is not forthcoming within three months of the filing of application for abatement, "it shall then be deemed to be denied and the taxpayer shall have the right at any time within three months thereafter, to take any appeal from such denial to which he may be entitled by law. . . ." M.G.L. c. 58A § 6. In addition to the abatement remedy, a taxpayer may challenge a tax by a suit for declaratory relief. M.G.L. c. 231A, §§ 1, 2. *See* Massachusetts Ass'n of Tob. Dist. v. State Tax Comm'n, 354 Mass. 85, 88, 235 N.E.2d 557, 559 (1968); Stow v. Comm'r of Corporations & Taxation, 336 Mass. 337, 339, 145 N.Ed.2d 720, 721 (1957). Amounts are abated with interest. M.G.L. c. 58A § 13.

We believe these procedures afford intervenors here a "plain, adequate and complete" means of resolving any

issues, federal as well as state, they wish to raise.[12] *Great Lakes, supra,* 319 U.S. at 297, 63 S.Ct. 1070; Helmsley v. Detroit, 320 F.2d 476, 478-480 (6th Cir. 1963); Houston v. Standard Triumph Motor Co., 347 F.2d 194, 199 (5th Cir. 1965), cert. denied, 382 U.S. 974, 86 S.Ct. 539, 15 L.Ed.2d 466 (1966); American Commuters Ass'n v. Levitt, 405 F.2d 1148, 1152 (2d Cir. 1969). *Cf.* Hillsborough v. Cromwell, 326 U.S. 620, 624, 626, 66 S.Ct. 445, 90 L.Ed. 358 (1946).

While the Commonwealth has not urged that we refrain from deciding the § 5(h) claim as it relates to the income tax, it has cited *Great Lakes* for more limited purposes both here and below; and its pleadings raised the question we now consider. In view of the Supreme Court's statement that it is the "duty" of federal courts to withhold declaratory relief in appropriate situations, *Great Lakes, supra,* 319 U.S. at 300-301, 63 S.Ct. 1070, we do not regard the Commonwealth's failure to press fully the issue here as a bar to our following the admonitions of *Great Lakes* and cases following.[13] We are not confronted with a case

[12] State courts have concurrent jurisdiction with the federal courts in the enforcement of federal law, absent a vesting of exclusive jurisdiction in the federal courts. Claflin v. Houseman, 93 U.S. 130, 136, 23 L.Ed. 833 (1876); *see* Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947). Section 5(h) of the Home Owners' Loan Act has already been applied once by the Massachusetts Supreme Judicial Court to hold invalid a state taxing scheme. Comm'r of Corporations and Taxation v. Flaherty, *supra. See also* Agricultural National Bank of Berkshire County v. State Tax Comm'n, 353 Mass. 172, 229 N.E.2d 245 (1967), rev'd, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968).

[13] In *City of Houston, supra,* Chief Judge Brown writing for the majority said that "it is inconceivable that the Supreme Court intended [in *Great Lakes*] to allow any discretion to grant declaratory relief where adequate state remedies were available." 347 F.2d at 199. We do not, however, need to decide the question presented there, whether, despite the fact that the *Great Lakes* issue was not presented below, the Court of Appeals could properly vacate the judgment for taxpayers under the doctrine of that case. Here, the Attorney General did urge below that the court withhold relief on grounds that an adequate state court remedy existed.

which was exhaustively tried below, where our failure to act, besides disappointing litigants, might lead to a waste of judicial resources. The factual record on the income tax claims is nonexistent and, indeed, quite unsatisfactory for decision of the delicate questions raised. We have neither evidence, agreed facts, nor lower court findings showing the tangible impact and operation of the challenged tax.

That the federal associations have been permitted to intervene in the United States' action, and that the United States' claim has been sustained, do not alter the requirement that the consideration of intervenors' claims regard [974] ing the income tax be withheld. They and the United States stand on different footing as litigants in federal courts seeking to interfere with state taxing schemes. The United States itself is not barred by the Johnson Act from obtaining relief against state taxes in the federal courts. Dept. of Employment v. United States, *supra,* 385 U.S. 355, 358, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966); United States v. Arlington County, 326 F.2d 929, 931 (4th Cir. 1964). *See also* United States v. Bureau of Revenue of the State of New Mexico, 291 F.2d 677, 679 (10th Cir. 1961); United States v. Woodworth, 170 F.2d 1019 (2d Cir. 1948); City of Springfield v. United States, 99 F.2d 860, 862 (1st Cir. 1938), cert. denied 306 U.S. 650, 59 S.Ct. 592, 83 L.Ed. 1049 (1939); United States v. Livingston, 179 F.Supp. 9, 11-12 (E.D. S.C.1959), aff'd, 364 U.S. 281, 80 S.Ct. 1611, 4 L.Ed.2d 1719 (1960). These cases rest in part on the proposition that, absent a strong contrary legislative purpose, the Johnson Act should not bar the United States from access to its own courts of equity, when it seeks to assert its own interest or that of its own instrumentalities.

See United States v. Livingston, *supra,* 179 F.Supp. at 11-12; United States v. Arlington County, *supra,* 326 F.2d at 931, 932-933. Likewise, the equitable doctrine of *Great Lakes* should not deny relief to the United States when it seeks to implement federal policy.

But the intervenors can get no benefit from the presence of the United States. It did not challenge the income tax, and has not joined in the intervenors' complaint or appeal. They are in a different posture than the co-plaintiffs in Dept. of Employment v. United States and other cases cited *supra,* where the non-government party asserted the same claims as the United States.[14] We have found only one case where an instrumentality of the United States—an Indian tribe—suing without the aid of the United States has had its claims for relief considered, notwithstanding the Johnson Act. Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184, 1186 (9th Cir. 1971), cert. denied 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972). But that was not a case where the United States had clearly passed up the opportunity to challenge the particular state taxing scheme. Moreover, involving as it did a suit by a party having a unique place in federal law, we see no reason to extend it to all situations where an instrumentality brings a suit against a state or local taxing scheme independently of the United States. The 4500 federal associations, while entitled to wear the mantle of "federal instrumentalities", have many of the characteristics

[14] In United States v. Arlington County, *supra,* 326 F.2d at 932-933, the court said:

> Here we find that the interest of the national government in the proper implementation of its policies and programs involving the national defense is such as to vest in it the non-statutory right to maintain this action. Under these circumstances the incapacity of the individual plaintiff to maintain his action is immaterial since he may find shelter under the Government's umbrella.

of private corporations. They are at the bottom of a three-tiered arrangement headed by the Home Loan Bank Board. It is reasonable, as a prerequisite to by-passing normal state tax collection and litigation channels, that they persuade the Attorney General of the United States, acting on behalf of the Home Loan Bank Board, to join in their claim. We conclude that under the principles of *Great Lakes* intervenors may not obtain declaratory relief against the income tax.

Deciding on this broad ground, we need not rest on any other grounds relating more specifically to several of the issues raised. Plainly, however, some of these claims would have to be dismissed, or not considered, even absent [975] the *Great Lakes* policy discussed above. The federal and state constitutional claims raised for the first time here would not be considered by this Court. Talmanson v. United States, 386 F.2d 811, 812 (1st Cir. 1967), cert. denied 391 U.S. 907, 88 S.Ct. 1658, 20 L.Ed.2d 421 (1968); Securities & Exchange Comm'n v. Milner, 474 F.2d 163, 166 (1st Cir. 1973). The district court did not abuse its discretion in not exercising pendent jurisdiction over the state constitutional claims concerning the income tax. While federal courts have power to determine state law claims joined with federal claims where the different claims "derive from a common nucleus of operative fact", "[t]hat power need not be exercised in every case". United Mine Workers of America v. Gibbs, 383 U.S. 715, 725-726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). In light of the strong federal policy against interference with state taxing schemes, this was a case where "[n]eedless decisions of state law should be avoided . . . as a matter of comity." *Id.* at 726, 86 S.Ct. at 1139. Similarly, the district court wisely abstained from determining the federal constitutional claim concerning the operating expenses aspect of

the income tax, given the existence of pending state proceedings that might have mooted the constitutional claim. *See* Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); Askew v. Hargrave, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971).

The declaratory judgment entered by the district court on August 9, 1972, is set aside. A modified judgment is to be entered, clause (1) of which to be worded as set forth earlier in this opinion, and clause (2) of which is to be worded as follows:

> (2) All additional relief sought by the intervening plaintiffs is denied without consideration of the merits.

So ordered. Costs for appellees in each case. [976]

Supreme Court, U. S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

APPENDIX.

Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL.,
APPELLANTS,

v.

STATE TAX COMMISSION, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

DOCKETED AUGUST 31, 1977.
PROBABLE JURISDICTION NOTED NOVEMBER 14, 1977.

Table of Contents.

Superior Court Docket	1
Supreme Judicial Court Docket	5
Affidavit of Roger A. Eastman	6
Stipulation of Facts	10
Exhibit 3 to the Stipulation of Facts	15
Exhibit 4 to the Stipulation of Facts	133
Exhibit 5 to the Stipulation of Facts	135
Addendum	145
Opinion of the Supreme Judicial Court	147
Notice of Appeal	148
Order Noting Probable Jurisdiction	150

Superior Court Docket.

No. 6161

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS
Superior Court for
Civil Business

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BOSTON, ET ALS

vs.

STATE TAX COMMISSION ET ALS

PLAINTIFFS
Boston Federal Savings and Loan Assoc.
Colonial Federal Savings and Loan Assoc.
Security Federal Savings and Loan Association of Brockton
Second Federal Savings and Loan Assoc.
First Federal Savings and Loan Assoc. of Worcester
Union Federal Savings and Loan Association of Boston
Metropolitan Federal Savings and Loan Association
Bay State Federal Savings and Loan Association
First Federal Savings and Loan Association of Fall River
First Federal Savings and Loan Association of Cape Cod
First Federal Savings and Loan Association of Lowell
Family Federal Savings and Loan Assoc.
(f/k/a Fitchburg Federal Savings and Loan Association)
Natick Federal Savings and Loan Association
Union Federal Savings and Loan Assoc.
Plymouth Federal Savings and Loan Assoc.
Revere Federal Savings & Loan Assoc.
Middlesex Federal Savings & Loan Assoc.
Winter Hill Federal Savings & Loan Assoc.
Waltham Federal Savings & Loan Assoc.

Mutual Federal Savings & Loan Assoc. of Whitman
First Federal Savings and Loan Assoc. of Attleboro
Edward Everett Federal Savings and Loan Assoc.
Scituate Federal Savings and Loan Assoc.
Milford Federal Savings and Loan Assoc.
Monument Federal Savings and Loan Assoc.
Leader Federal Savings and Loan Assoc.
Foxboro Federal Savings and Loan Assoc.
People Federal Savings and Loan Assoc.
Bay Colony Federal Savings and Loan Association
Montello Federal Savings and Loan Association
Home Federal Savings and Loan Association
Home Owners Federal Savings and Loan Association
Northeast Federal Savings and Loan Association

PLAINTIFF'S COUNSEL
RICHARD J. MCCARTHY 1-9-76
GASTON SNOW & ELY BARTLETT (4-16-75)
82 Devonshire St., Boston
CHESTER H. HOWE 1-19-76 (for plffs.)
225 Franklin St.

DEFENDANTS
NICHOLAS L. METAXAS, Chairman and Member of the State Tax Comm. and Commissioner of Corporations and Taxations of the Comm. of Mass.
M. JOSEPH STACEY, DEBORAH ECKER, Members of the State Tax Commission of the Comm. of Mass.

DEFENDANT'S COUNSEL
HOWARD WHITEHEAD — Asst. Atty. Gen. 1-9-76
373 State House. (State Tax Commission)

ACTION
EQUITABLE RELIEF

DOCKET

DATE			
1975		No.	Entered
Apr.	16	1	Complaint.
May	6	2	Mo. of defts. to enlarge time to file ANSWER to & incl. May 14, 1975.
May	14	3	Mo. of defts. to enlarge time to file ANSWER to & incl. May 19, 1975.
May	15	4	Notice of taking deposition under rule 30B re: Workingmen's Cooperative Bank, Quincy Cooperative Bank, Merchants Cooperative Bank, Needham Cooperative Bank & Mattapan Cooperative Bank.
May	15	5	Notice of taking deposition under rule 30B re: The Boston Five Cents Savings Bank, Union Warren Savings Bank, The Provident Institution for Savings, Suffolk Franklin Savings Bank, Charlestown Savings Bank & Dorchester Savings Bank.
May	16	6	Mo. of deft. State Tax Commission to stay.
May	16	7	ANSWER of deft. State Tax Commission.
May	27	8	Objections to subpoenas re: deposition.
May	29	—	Mo. (p. #6) denied without prejudice. (Morse, J.)
Dec.	10	9	Amended complaint.
Dec.	10	10	ANSWER of defts. to plffs. amended complaint.
Dec.	24	10b	Affidavit of Roger A. Eastman.
Dec.	24	11	Plffs. Mo for Summary Judgment.
Dec.	24	12	Defts. Mo. for Summary Judgment.
Dec.	24	13	Request of parties for report of questions of Law.
Dec.	24	14	Stipulation of facts.

1976

Jan.	2	15	Order: It is hereby ordered that action be placed on the without jury list for hearing in the advan. section Jan. 5, 1976 First Case Out. re: Request for report. (Ford, J.) No. Sent 1/5/76.
Jan.	9	—	Trial 2nd session without jury. (Hallisey, J.).
Jan.	30	16	Reservation and Report. No. sent 2-3-76. (Hallisey, J.)
Feb.	3	—	Notices of service of Report were sent to the following: Messrs. Gaston, Snow & Ely Bartlett, Richard J. McCarthy, Esquire, 82 Devonshire St., Boston, Ma. 02109, Chester M. Howe, Esquire, 225 Franklin St., Boston, Ma. 02110 and Howard Whitehead, Assistant Attorney General, State House — Room 373, Boston, Ma 02133.
		—	Notice record on appeal assembled.
Dec.	22	10a	Second amendment to Complaint, and assented to.
Mar.	1	—	Notice record on appeal assembled.

I hereby attest and certify on Mar. 16, 1976 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

THOMAS DORGAN,
Clerk, Superior Civil Court
Suffolk County
By Michael J. Sclafani
Asst. Clerk

Supreme Judicial Court Docket.

EQUITY No. SJC-641

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, AND OTHERS

vs.

STATE TAX COMMISSION, AND OTHERS

Counsel for Plaintiff	Counsel for Defendant
GASTON SNOW & ELY BARTLETT	HOWARD WHITEHEAD, A.A.G.
RICHARD J. MCCARTHY	

4-15-76.	Direct Appellate Review Allowed (M479). Entered April 26, 1976
June 4, 1976.	Brief of plaintiff-appellants filed by Chester M. Howe, Vincent J. Cherry and Pamela Duckworth of Gaston Snow & Ely Bartlett.
9-9-76.	Brief for appellees filed by Howard Whitehead, Asst. Attorney General. Argued November 3, 1976 by Chester Howe (for plaintiff) Argued November 4, 1976 by Howard Whitehead (for def.)
5-3-77.	A declaratory judgment shall be entered in the Superior Court consistent with the opinion.

Rescript May 3, 1977. Notice sent to counsel.
See opinion on file.

(d)	July 20, 1977.	Notice of appeal to the Supreme Court of the United States.

November 28, 1977

I hereby certify that the above entries are a true copy of the docket entries on file with this court in re: First Federal Savings and Loan Association of Boston et al v. State Tax Commission et al, SJC-641.

William M. Cloran, Asst. Clerk
Supreme Judicial Court for the
Commonwealth of Massachusetts

Affidavit of Roger A. Eastman.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. SUPERIOR COURT
No. 6161

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BOSTON, ET AL.,
Plaintiffs
vs.
STATE TAX COMMISSION,
Defendant

Affidavit of
ROGER A. EASTMAN

Roger A. Eastman, being first duly sworn, deposes and says:

1. I am a partner in the international accounting firm of Arthur Andersen & Co., and have been a partner there since 1968.

2. I am presently the partner in charge of the banking division of Arthur Andersen & Co.'s Boston office. As such, I supervise the auditing of approximately forty (40) bank clients, including national banks, state and federal savings and loan associations, and savings banks.

3. I have been involved in bank auditing and accounting for eighteen (18) years. In 1963 I was qualified in Massachusetts as a certified public accountant, and have subsequently been qualified as a certified public accountant by the states of Michigan, Louisiana, North Carolina and Virginia.

4. I am a member and past president of the Bank Accounting and Auditing Committee of the Massachusetts Society of Public Accountants, and am also a member of several other professional accounting groups, including

the American Institute of Certified Public Accountants and the Massachusetts Society of Certified Public Accountants.

5. I have been formally accepted as an expert witness by the Departments of Banking for the states of New Jersey and New York, and have in fact testified as an expert witness before several other bank supervisory agencies, including the Commissioner of Banks and Banking of the Commonwealth of Massachusetts.

6. The American Institute of Certified Public Accountants has published an industry audit guide entitled *Audits of Savings and Loan Associations* ("Audit Guide"), the most recent edition of which was published in 1973. I, those people under my supervision, and the business accounting profession in general customarily refer to and follow the principles set forth in this Audit Guide when auditing the books, records, and financial statements of federal savings and loan associations.

7. The Audit Guide contains accounting principles and auditing procedures, including model statements of condition and of income, to be followed by accountants in auditing the financial records and statements of federal savings and loan associations. Attached hereto as Exhibit A are: 1) a true copy of illustrative financial forms and text contained in the Audit Guide which categorize interest on savings accounts as an expense of a federal savings and loan association; and 2) a true copy of the Audit Guide's definition of "interest" and "dividend" as those terms are applied to federal savings and loan associations.

8. For business accounting purposes an expense is a cost which has expired in the process of producing revenue or with the passage of time. All expenses are related to the production of revenue, and are defined as either "operating" or "non-operating." Attached hereto as Exhibit B is a true copy of relevant portions of *Inventory of Gen-*

erally Accepted Accounting Principles for Business Enterprises (published by the American Institute of Certified Public Accountants) which establish accounting principles with respect to operating expenses and the differences between "operating" and "non-operating" (gain or loss) expenses.

9. With respect to the auditing of financial records and statements of banks, and the application of accounting principles thereto, it is my practice, and to my knowledge the practice of certified public accountants generally, to treat the interest paid by banks on deposits as an operating expense. Attached hereto as Exhibit C is a true copy of an illustrative form bank statement of income from *Audits of Banks, Including Supplement*, prepared by the Committee on Bank Accounting and Auditing of the American Institute of CPA's (1969), which reflects this treatment of interest as an operating expense.

10. Under the standard bank auditing and accounting principles stated in paragraphs 6 through 9 hereof, the dividends or interest paid on deposits by federal savings and loan associations are operating expenses.

11. A guaranty fund, federal insurance reserve, or surplus are not items, categories, or allocations which appear on any bank's financial statement of income. They are retained income items which are included in a statement of financial condition.

12. A statement of financial condition is the balance sheet (assets/liabilities and retained income or stockholders' equity) of a given business as of a given day. Attached hereto as Exhibit D is a true copy of the illustrative statements of financial condition contained in the Audit Guide.

13. Exhibit D separates retained income into two categories: appropriated to general reserves and unappropri-

ated. These terms are defined in the Audit Guide, which includes within general reserves the additions to its federal insurance reserve required by law of each federal savings and loan association. Attached hereto as Exhibit E is a true copy of these portions of the Audit Guide which define and treat the different categories of retained income.

14. The American Institute of Certified Public Accountants' Opinion No. 9, a true copy of which is attached hereto as Exhibit F, states the generally accepted accounting principle that transfers to and from accounts designated as appropriated retained earnings are not income or expense items.

15. Under the generally accepted business accounting principles and auditing procedures set forth in paragraphs 11 through 14 hereof, a federal savings and loan association's required periodic addition to its insurance reserve is an allocation of a part of said association's equity or net worth, and is not a factor in determining said association's income or expense.

ROGER A. EASTMAN

Signed and sworn to before me this 25th day of November, 1975.

GERARD A. DEBEAU
Notary Public
My commission expires Oct. 9, 1981

[Exhibits omitted in printing].

Stipulation of Facts.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. SUPERIOR COURT
No. 6161

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BOSTON, ET AL.,
PLAINTIFFS,

v.

STATE TAX COMMISSION, ET AL.,
DEFENDANTS.

STIPULATION OF FACTS.

Reserving all rights to introduce additional evidence if necessary, and to object to the introduction of any of the within evidence on the grounds of relevancy or materiality, the parties hereby agree that the following facts are true for the purposes of this action:

1. Each of the plaintiffs, First Federal Savings and Loan Association of Boston, Boston Federal Savings and Loan Association, Colonial Federal Savings and Loan Association, Security Federal Savings and Loan Association of Brockton, Second Federal Savings and Loan Association, Freedom Federal Savings and Loan Association, Union Federal Savings and Loan Association of Boston, Metropolitan Federal Savings and Loan Association, Bay State Federal Savings and Loan Association, First Federal Savings and Loan Association of Fall River, First Federal Savings and Loan Association of Cape Cod, First Federal Savings and Loan Association of Lowell, Family Federal Savings and Loan Association, Natick Federal Savings and Loan Association, Union Federal Savings and Loan Association, Plymouth Federal Savings and Loan Associa-

tion, Revere Federal Savings and Loan Association, Middlesex Federal Savings and Loan Association, Winter Hill Federal Savings and Loan Association, Waltham Federal Savings and Loan Association, Mutual Federal Savings and Loan Association of Whitman, First Federal Savings and Loan Association of Attleboro, Edward Everett Savings and Loan Association, Scituate Federal Savings and Loan Association, Milford Federal Savings and Loan Association, Monument Federal Savings and Loan Association, Leader Federal Savings and Loan Association, Foxboro Federal Savings and Loan Association, People's Federal Savings and Loan Association, Bay Colony Federal Savings and Loan Association, Montello Federal Savings and Loan Association of Brockton, Home Federal Savings and Loan Association, Home Owners Federal Savings and Loan Association and Northeast Federal Savings and Loan Association, is a mutual federal savings and loan association chartered pursuant to the provisions of 12 U.S.C. §§1461-1468.

2. The charter of each of the plaintiffs is identical to one of two charters, copies of which are attached hereto as Exhibit 1, except that the charter of some of the plaintiffs is identical to one of the Exhibit 1 charters with one or more amendments thereto, the text of which amendments is set forth in Exhibit 1A. The specific charter employed by any given plaintiff may be determined by reference to the last page of Exhibit 1A.

3. Each of the plaintiffs is a member of the Federal Home Loan Bank System pursuant to the provisions of 12 U.S.C., §§1421-1429. Each of the plaintiffs is also an insured institution pursuant to the provisions of 12 U.S.C., §§1724-1730C.

4. Together, the plaintiffs constitute all of the chartered federal savings and loan associations located within the Commonwealth.

5. Defendant Nicholas L. Metaxas was the Commissioner of Corporations and Taxation for the Commonwealth and a member of the defendant State Tax Commission pursuant to the provisions of G.L. c. 14, §2. He has been succeeded in both capacities by Owen L. Clarke. Defendant Deborah S. Ecker and M. Joseph Stacy were Associate Commissioners of the Department of Corporations and Taxation of the Commonwealth and members of the defendant State Tax Commission pursuant to the provisions of G.L. c. 14, §§ 1 and 2. They have been succeeded in both capacities by Ruth L. Kleinfeld and L. Joyce Hampers.

6. Defendant State Tax Commission is an agency of the Commonwealth established pursuant to the provisions of G.L. c. 14, §2.

7. The defendant Commissioner of the Department of Corporations and Taxation is charged, pursuant to the provisions of G.L. c. 14, §3, with the primary administration of the provisions of G.L. c. 63, §§11(a)(1) and 11(b)(1). The defendant State Tax Commission is charged, pursuant to the provisions of G.L. c. 63, §§18A and 51, with the abatement of the tax shown on a return filed pursuant to the provisions of G.L. c. 63, §§11(a)(1) and 11(b)(1) when said tax is found by said Commission to be excessive.

8. The plaintiffs have, for various assessment periods, paid to the Commonwealth the excise tax imposed by the provisions of G.L. c. 63, §§11(a)(1) and 11(b)(1). The specific periods for which each plaintiff has paid said tax are set forth in paragraphs thirty-seven through seventy of Defendants' Answer to the Second Amended Complaint.

9. The plaintiffs also have, for various assessment periods, filed with the defendant State Tax Commission, pursuant to the provisions of G.L. c. 63, §§18A and 51, applications for abatement of the excise tax imposed by the provisions of G.L. c. 63, §§11(a)(1) and 11(b)(1). With respect

to applications for abatement which have been denied by the defendant State Tax Commission, the plaintiffs have generally filed, pursuant to the provisions of G.L. c. 63, §71, petitions under formal procedure with the Appellate Tax Board of the Commonwealth. The exact extent to which each plaintiff has or has not pursued said remedies is set forth in paragraphs thirty-seven through seventy of Defendants' Answer to the Second Amended Complaint.

10. The defendants have not refunded or abated to any of the plaintiffs any taxes paid to the Commonwealth pursuant to the provisions of G.L. c. 63, §§11(a)(1) and 11(b)(1).

11. Attached hereto as Exhibit 2 is a copy of the excise return form (Form BDI-1) and instruction sheet prepared by the Department of Corporations and Taxation of the Commonwealth for use by institutions when filing in accordance with G.L. c. 63, §11.

12. With respect to the computation of "net operating income" pursuant to the provisions of G.L. c. 63, §§11(a)(1) and 11(b)(1), the defendants have, as a matter of practice, not permitted any institution subject to said sections to deduct from its gross income "dividends" or "interest" paid depositors.

13. Attached hereto as Exhibit 3 are figures which reflect: 1) the total assets and the minimum annual additions made to a guaranty fund, surplus, or federal insurance reserve as required by law or the appropriate federal state supervisory authority for a) each Massachusetts cooperative bank from taxable year 1968 through and including taxable year 1975, b) each Massachusetts savings bank from taxable year 1968 through and including taxable year 1974, c) each Massachusetts federal savings and loan association from taxable year 1968 through and including taxable year 1974; 2) a cumulative total by year of the figures for all

Massachusetts savings banks, Massachusetts cooperative banks, and Massachusetts federal savings and loan associations, together with a figure which is the ratio of the cumulative minimum required additions figure to the cumulative total assets figure.

14. Attached hereto as Exhibit 4 are figures which represent on an annual basis the plaintiffs' cumulative gross income and cumulative gross income from mortgage loans secured by real estate located outside the Commonwealth of Massachusetts (including mortgage participations).

15. Attached hereto as Exhibit 5 are figures which show the composition of the assets for all Massachusetts federal savings and loan associations, all Massachusetts credit unions, all Massachusetts cooperative banks, and all Massachusetts savings banks for fiscal years 1966 through and including 1973.

16. Pursuant to a decision of the United States Court of Appeals in *United States v. State Tax Commission*, 481 F.2d 963 (1st Cir. 1973), the plaintiffs have been made exempt from the tax imposed by G.L. c. 63, §§11(a)(2) and 11(b)(2), and those plaintiffs who have filed timely applications for abatement have received refunds of all payments of said tax made prior to said decision.

Dated: December 24, 1975

For the Plaintiffs,	For the Defendants,
CHESTER M. HOWE	HOWARD WHITEHEAD
VINCENT J. CHERRY	Assistant Attorney General
RICHARD J. MCCARTHY	Room 373, State House
GASTON SNOW & ELY BARTLETT	Boston, Massachusetts 02133
82 Devonshire Street	
Boston, Massachusetts 02109	

[Exhibits 1, 1A, and 2 omitted in printing].

EXHIBIT 3

TO THE

STIPULATION OF FACTS

(A) COOPERATIVE BANKS

CO-OPERATIVE BANKS[1]

1968

	Total Assets	Minimum Required Additions To Guaranty Fund
North Abington	$ 7,303,283.	$ 14,851.
Adams	6,818,795.	13,749.
The Amesbury	3,962,177.	8,540.
The Arlington	23,354,714.	49,938.
Athol-Clinton	10,846,478.	22,390.
Attleborough	4,373,618.	8,977.
Auburn	5,546,847.	11,571.
Avon	3,865,389.	7,596.
Hyannis	48,463,485.	112,865.
Waverley	14,275,609.	30,290.
Beverly	22,257,119.	48,207.
Beacon	3,126,153.	5,379.
Brighton	22,932,828.	48,981.
Charlestown	1,695,350.	3,473.
The Commonwealth	5,836,830.	12,477.
Enterprise	5,808,075.	10,579.
Farragut	3,940,211.	7,399.
Forest Hills	7,876,377.	16,002.
Haymarket	19,149,131.	36,330.
Hyde Park	8,799,419.	18,268.
Jamaica Plain	4,638,589.	9,545.
Joseph Warren	4,796,252.	8,920.
Massachusetts	11,861,697.	29,839.
The Mattapan	39,808,183.	55,515.
Meeting House Hill	22,557,938.	53,035.
Merchants	111,110,608.	231,784.

	Total Assets	Minimum Required Additions To Guaranty Fund
Dorchester Minot	$ 13,977,268.	$ 28,772.
Mt. Vernon	19,213,150.	39,891.
Mt. Washington	13,823,713.	29,363.
Pioneer	7,635,010.	15,344.
Roslindale	12,327,088.	25,560.
Roxbury-Highland	5,432,880.	10,506.
Telephone Workers'	9,342,606.	19,362.
Volunteer	30,510,132.	67,865.
Workingmens	93,160,117.	416,480.
The Braintree	16,567,077.	35,567.
Bridgewater	2,612,311.	4,850.
Campello	26,015,179.	53,002.
Brookline	7,090,828.	13,994.
Chestnut Hill	7,753,352.	14,394.
Coolidge Corner	7,083,286.	17,622.
The Columbian	2,376,541.	4,863.
North Cambridge	17,940,123.	40,944.
Reliance	26,387,453.	17,444.
Canton	8,000,237.	15,756.
Chelsea	3,868,582.	7,617.
The Provident	6,177,061.	11,848.
Chester	1,108,467.	2,414.
Chicopee	4,142,151.	-435.
Pilgrim	6,081,896.	13,069.
Concord	20,041,332.	41,533.
Danvers	4,152,125.	8,464.
Dedham	11,642,801.	24,472.
North Dighton	2,442,039.	78.
East Bridgewater	2,034,497.	3,991.

	Total Assets	Minimum Required Additions To Guaranty Fund
East Hampton	$ 2,184,989.	$ 4,006.
The North Easton	5,356,674.	11,340.
Everett	14,998,604.	30,640.
Glendale Square	4,968,535.	9,627.
The Fall River Peoples	11,134,722.	23,750.
The Lafayette	15,829,062.	317,949.
The Falmouth	14,820,727.	33,567.
Fidelity	32,215,914.	70,804.
Framingham	40,283,833.	82,094.
South Middlesex	9,299,480.	19,178.
Dean	4,196,178.	8,556.
The Chair-Town	3,626,921.	6,897.
Gardner	5,458,285.	11,150.
Gloucester	16,141,659.	34,173.
Grafton	4,060,554.	8,001.
The Housatonic	2,659,702.	5,400.
Greenfield	21,524,885.	45,551.
Haverhill	19,622,585.	44,900.
Whittier	5,498,112.	12,069.
The Hingham	5,253,194.	10,226.
The Holbrook	5,531,158.	11,084.
The City	4,120,084.	8,757.
Holyoke	2,772,431.	5,454.
The Hudson	6,635,610.	13,352.
Hull	5,151,782.	10,587.
Ipswich	6,391,285.	14,256.
Atlantic	6,564,645.	13,591.
Lawrence	14,946,805.	28,092.
The Merrimack	13,252,313.	27,226.

	Total Assets	Minimum Required Additions To Guaranty Fund
B.F. Butler	$ 1,879,121.	$ 3,888.
Lowell	7,395,804.	15,654.
Equitable	20,115,625.	15,796.
Lincoln	17,777,317.	39,573.
Fellsway	6,364,940.	12,321.
Malden	37,701,171.	78,563.
Mansfield	11,090,983.	22,982.
The Marblehead	3,985,836.	8,973.
The Marlborough	18,711,884.	40,330.
Community	4,990,406.	9,503.
Hillside-Cambridge	6,356,403.	13,197.
The Medford	8,505,956.	16,731.
West Medford	5,197,098.	10,551.
Medway	4,419,876.	8,832.
Melrose	13,486,627.	29,298.
The Economy	1,049,328.	2,250.
Methuen	5,597,605.	38,543.
Middleborough	19,013,844.	40,055.
Millbury	1,799,096.	3,206.
Milton	5,896,742.	11,920.
The Needham	41,103,094.	89,668.
New Bedford-Acushnet	11,520,945.	24,153.
Newburyport	3,108,751.	6,265.
The Auburndale	9,461,281.	19,247.
The Newton	20,041,401.	41,364.
Newton South	6,492,112.	13,671.
West Newton	9,884,250.	20,597.
The Northampton	16,315,465.	32,349.
The Norwood	29,937,542.	64,482.

	Total Assets	Minimum Required Additions To Guaranty Fund
The Peabody	$ 25,499,186.	$ 52,249.
The Pittsfield	30,322,447.	65,319.
The Granite	7,339,062.	25,946.
The Quincy	60,879,723.	135,413.
Shipbuilders	6,632,210.	-3,487.
The Randolph	8,543,335.	22,994.
Reading	11,912,785.	24,503.
Rockland	2,826,746.	5,400.
The Roger Conant	10,276,895.	20,150.
Salem	16,354,483.	34,959.
Sandwich	19,461,230.	43,883.
Saugus	6,608,143.	14,240.
The Sharon	7,103,651.	14,406.
Shirley	4,028,768.	8,659.
Central	7,324,287.	16,433.
Somerville	7,106,243.	13,889.
The Southbridge	17,499,768.	38,952.
United	40,471,301.	1,290,721.
Stoneham	12,635,701.	24,352.
The Stoughton	10,454,363.	11,145.
Puritan	1,501,099.	3,637.
Mechanics	7,910,753.	16,190.
Taunton	18,876,067.	38,414.
The Weir	6,080,583.	13,284.
The Baldwinville	1,299,698.	2,491.
The Martha's Vineyard	2,790,825.	6,043.
Uxbridge	4,802,109.	10,110.
Wakefield	13,821,277.	29,451.
Walpole	9,082,711.	19,180.

	Total Assets	Minimum Required Additions To Guaranty Fund
Middlesex Family	$ 4,081,038.	$ 8,169.
Ware	16,697,754.	35,731.
Wareham	5,556,268.	11,249.
The Webster	4,220,939.	8,268.
Wellesley	8,269,774.	16,665.
Westfield	19,244,240.	34,779.
The North Weymouth	5,897,646.	12,220.
South Shore	9,980,618.	21,151.
South Weymouth	5,649,545.	11,691.
Winchendon	2,962,535.	3,520.
Winchester	9,329,742.	19,722.
Winthrop	3,882,785.	7,853.
Woburn	14,645,657.	30,925.
Wrentham	2,757,709.	5,939.
The Cape Cod	18,822,544.	42,233.

CO-OPERATIVE BANKS[1]

1969

	Total Assets	Minimum Required Additions To Guaranty Fund
North Abington	$ 7,602,979.	$ 15,887.
Adams	7,174,902.	15,843.
The Amesbury	4,091,519.	9,203.
The Arlington	24,968,024.	56,931.
Athol-Clinton	11,451,455.	26,181.
Attleborough	4,251,260.	9,336.
Auburn	5,796,793.	12,821.
Avon	3,893,156.	8,511.
Hyannis	52,565,457.	127,606.
Waverly	15,072,170.	32,193.
Beverly	22,951,826.	51,828.
Beacon	3,090,123.	6,333.
Brighton	23,989,485.	54,643.
Charlestown	1,885,521.	4,027.
The Commonwealth	6,204,404.	13,641.
Enterprise	6,015,093.	12,110.
Farragut	4,351,691.	9,657.
Forest Hills	8,270,211.	17,189.
Haymarket	22,413,303.	45,697.
Hyde Park	9,286,280.	19,759.
Jamaica Plain	4,920,715.	10,009.
Joseph Warren	5,065,842.	10,124.
Massachusetts	12,238,537.	29,960.
The Mattapan	45,669,979.	106,937.
Meeting House Hill	23,208,740.	57,364.
Merchants	120,392,235.	293,604.

	Total Assets	Minimum Required Additions To Guaranty Fund
Dorchester Minot	$ 14,990,882.	$ 32,224.
M[t.] Vernon	22,214,690.	52,253.
Mt. Washington	13,278,380.	31,577.
Pioneer	7,246,049.	14,440.
Roslindale	13,175,983.	29,598.
Roxbury-Highland	5,605,273.	11,467.
Telephone Workers'	9,590,090.	20,281.
Volunteer	31,831,041.	72,844.
Workingmens	97,080,940.	535,255.
The Braintree	18,223,642.	38,649.
Bridgewater	2,628,086.	5,510.
Campello	26,585,878.	58,042.
Brookline	7,365,032.	15,694.
Chestnut Hill	9,874,660.	19,839.
Coolidge Corner	8,959,989.	18,862.
North Cambridge	17,110,610.	39,805.
Reliance	26,862,668.	60,792.
Canton	8,648,411.	19,181.
Chelsea	3,971,699.	8,269.
The Provident	6,199,500.	12,592.
Chester	1,122,479.	2,503.
Chicopee	4,278,185.	9,221.
Pilgrim	6,160,939.	14,099.
Concord	21,049,491.	45,742.
Danvers	4,028,697.	8,645.
Dedham	12,167,809.	27,107.
North Dighton	2,490,430.	5,601.
East Bridgewater	2,040,747.	4,251.
East Hampton	2,282,313.	4,179.

	Total Assets	Minimum Required Additions To Guaranty Fund
The North Easton	$ 5,733,579.	$ 13,442.
Everett	16,333,375.	34,299.
Glendale Square	4,882,710.	9,947.
The Fall River Peoples	11,078,547.	24,030.
The Lafayette	16,568,779.	38,236.
The Falmouth	17,513,843.	40,755.
Fidelity	32,798,179.	77,316.
Framingham	43,368,293.	90,713.
South Middlesex	9,933,115.	21,505.
Dean	4,584,392.	9,610.
The Chair Town	3,667,687.	7,640.
Gardner	5,617,900.	11,916.
Gloucester	17,155,679.	37,883.
Grafton	4,170,611.	8,109.
The Housatonic	2,733,210.	5,900.
Greenfield	21,963,161.	48,687.
Haverhill	20,483,044.	48,280.
Whittier	5,593,878.	13,009.
The Hingham	5,324,266.	10,784.
The Holbrook	5,858,542.	12,852.
The City	4,380,016.	10,347.
Holyoke	2,672,036.	5,611.
The Hudson	7,337,868.	14,657.
Hull	5,472,213.	12,117.
Ipswich	6,982,800.	15,754.
Lawrence	22,115,679.	252,562.
The Merrimack	14,486,446.	30,246.
B.F. Butler	2,015,174.	4,248.
Lowell	7,451,660.	16,615.

	Total Assets	Minimum Required Additions To Guaranty Fund
Equitable	$ 20,186,321.	$ 43,438.
Lincoln	17,676,905.	41,912.
Fellsway	6,774,588.	13,955.
Malden	39,540,885.	90,924.
Mansfield	12,272,661.	27,687.
The Marblehead	4,055,128.	9,539.
The Marlboro	19,916,032.	45,699.
Community	5,227,638.	10,589.
Hillside-Cambridge	6,267,288.	13,257.
The Medford	8,981,652.	18,284.
West Medford	5,757,788.	11,464.
Medway	4,590,529.	9,725.
Melrose	13,714,828.	31,138.
The Economy	1,145,599.	2,606.
Methuen	5,921,687.	13,256.
Middleboro	22,861,601.	48,084.
Millbury	1,769,011.	3,402.
Milton	6,241,358.	12,759.
The Needham	44,784,714.	99,297.
New Bedford-Acushnet	11,808,683.	25,775.
Newburyport	3,051,932.	6,550.
The Auburndale	9,875,471.	21,595.
The Newton	30,248,996.	67,058.
Newton South	6,454,738.	13,866.
The Northampton	16,542,031.	34,684.
The Norwood	32,392,521.	71,126.
The Peabody	26,921,176.	60,469.
The Pittsfield	31,846,234.	71,002.
The Granite	8,165,964.	17,757.

	Total Assets	Minimum Required Additions To Guaranty Fund
The Quincy	$ 69,143,100.	$ 162,966.
Shipbuilders	7,001,269.	14,676.
The Randolph	9,279,450.	19,790.
Reading	12,538,907.	27,485.
Rockland	2,741,318.	5,245.
The Roger Conant	10,492,053.	21,753.
Salem	16,578,518.	37,757.
Sandwich	20,487,066.	47,585.
Saugus	7,373,393.	16,764.
The Sharon	7,630,735.	16,162.
Shirley	3,974,603.	8,208.
Central	10,489,188.	97,425.
Somerville	8,003,188.	15,729.
The Southbridge	18,275,000.	42,790.
United	42,669,866.	95,650.
Stoneham	14,606,646.	28,463.
The Stoughton	11,503,172.	23,959.
Puritan	1,808,948.	4,849.
Mechanics	8,800,900.	17,736.
Taunton	22,326,064.	33,753.
The Weir	6,412,840.	13,927.
The Baldwinville	1,389,623.	2,717.
The Martha's Vineyard	2,998,046.	6,424.
Uxbridge	4,945,368.	11,159.
Wakefield	14,603,847.	31,962.
Walpole	9,414,316.	20,869.
Middlesex Family	4,396,283.	9,148.
Ware	17,246,032.	38,000.
Wareham	5,806,678.	12,305.

	Total Assets	Minimum Required Additions To Guaranty Fund
The Webster	$ 4,173,463.	$ 8,498.
Wellesley	8,441,032.	18,472.
Westfield	20,382,289.	43,657.
The North Weymouth	6,166,509.	13,899.
South Shore	11,098,257.	24,584.
South Weymouth	5,805,606.	12,445.
Winchendon	3,008,819.	7,616.
Winchester	10,072,515.	22,063.
Woburn	15,340,498.	33,570.
Wrentham	3,042,085.	6,478.
The Cape Cod	20,070,142.	48,698.

COOPERATIVE BANKS[1]

1970

	Total Assets	Minimum Required Additions To Guaranty Fund
North Abington	$ 7,872,507.	$ 18,547.
Adams	7,792,834.	19,192.
The Amesbury	3,986,371.	9,388.
The Arlington	25,440,722.	63,490.
Athol-Clinton	11,814,198.	28,372.
Attleborough	4,048,903.	11,932.
Auburn	6,171,444.	14,112.
Avon	4,044,934.	9,071.
Hyannis	55,806,245.	144,306.
Waverley	15,441,682.	35,708.
Beverly	23,378,457.	56,304.
Beacon	3,082,908.	8,354.
Brighton	24,575,845.	58,669.
Charlestown	1,919,896.	4,760.
The Commonwealth	6,674,496.	15,505.
Enterprise	6,213,716.	13,445.
Farragut	4,815,435.	10,572.
Forest Hills	8,576,451.	19,887.
Haymarket	25,217,539.	58,365.
Hyde Park	9,592,274.	22,188.
Jamaica [Plain]	5,242,037.	11,702.
Joseph Warren	5,429,910.	10,429.
Massachusetts	12,200,182.	30,517.
The Mattapan	48,535,166.	127,128.
Meeting House Hill	22,876,951.	61,917.
Merchants	116,619,400.	303,595.

	Total Assets	Minimum Required Additions To Guaranty Fund
Dorchester Minot	$ 16,124,142.	$ 36,320.
Mt. Vernon	21,468,240.	58,203.
Mt. Washington	13,321,335.	32,949.
Pioneer	6,867,621.	14,848.
Roslindale	13,018,209.	31,665.
Roxbury-Highland	5,683,017.	12,361.
Telephone Workers'	9,973,908.	22,326.
Volunteer	31,424,506.	78,074.
Workingmens	96,663,942.	228,961.
The Braintree	19,275,249.	44,967.
Bridgewater	2,741,868.	5,821.
Campello	27,310,027.	63,120.
Brookline	7,507,417.	18,023.
Chestnut Hill	12,161,597.	26,877.
Coolidge Corner	12,747,789.	25,667.
North Cambridge	16,493,502.	40,015.
Reliance	26,774,751.	63,814.
Canton	10,090,516.	22,592.
Chelsea-Provident	10,603,523.	170,521.
Chester	1,172,389.	2,632.
Chicopee	4,608,008.	10,584.
Pilgrim	6,316,517.	15,356.
Concord	21,763,585.	52,859.
Danvers	3,897,707.	8,995.
Dedham	12,584,197.	30,044.
North Dighton	2,497,134.	5,661.
East Bridgewater	2,064,949.	4,310.
East Hampton	2,237,059.	4,325.
The North Easton	6,011,053.	14,216.

	Total Assets	Minimum Required Additions To Guaranty Fund
Everett	$ 17,623,910.	$ 40,238.
Glendale Square	5,183,390.	10,839.
The Fall River Peoples	11,535,355.	20,678.
The Lafayette	18,490,234.	43,918.
The Falmouth	19,339,286.	48,522.
Fidelity	33,447,192.	80,705.
Framingham	43,952,545.	97,738.
South Middlesex	11,124,435.	24,575.
Dean	4,812,825.	10,818.
The Chair-Town	3,807,304.	8,495.
Gardner	5,816,109.	13,920.
Gloucester	17,785,375.	42,073.
Grafton	4,271,098.	8,847.
The Housatonic	2,729,428.	6,207.
Greenfield	23,213,018.	66,775.
Haverhill	21,591,905.	51,613.
Whittier	5,615,650.	13,810.
The Hingham	5,189,643.	11,320.
The Holbrook	6,666,732.	15,123.
The City	4,469,004.	10,988.
Holyoke	2,504,011.	5,581.
The Hudson	8,046,037.	18,146.
Hull	5,897,938.	13,197.
Ipswich	7,722,681.	19,013.
Lawrence	22,364,619.	49,596.
The Merrimack	15,208,742.	37,395.
B.F. Butler	2,002,980.	4,482.
Lowell	7,376,327.	17,058.
Equitable	20,004,960.	47,485.

	Total Assets	Minimum Required Additions To Guaranty Fund
Lincoln	$ 16,910,461.	$ 42,087.
Fellsway	6,984,268.	15,594.
Malden	42,180,698.	97,591.
Mansfield	13,666,973.	33,852.
The Marblehead	4,039,235.	10,278.
The Marlborough	21,473,545.	51,986.
Community	5,694,220.	11,395.
Hillside-Cambridge	6,527,213.	15,435.
The Medford	14,759,381.	193,716.
Medway	4,826,032.	11,040.
Melrose	13,707,414.	33,482.
The Economy	1,145,560.	2,843.
Methuen	6,268,376.	14,286.
Middleborough	23,404,279.	60,331.
Millbury	1,636,802.	3,414.
Milton	6,235,965.	13,494.
The Needham	47,109,978.	117,851.
New Bedford-Acushnet	11,837,676.	28,021.
Newburyport	3,048,671.	6,768.
The Auburndale	9,942,939.	23,546.
The Newton	29,515,116.	67,149.
Newton South	6,419,275.	14,705.
The Northampton	17,160,918.	37,774.
The Norwood	33,858,490.	83,514.
The Peabody	27,421,076.	67,393.
The Pittsfield	34,604,691.	193,097.
The Granite	8,258,599.	21,005.
The Quincy	74,552,211.	192,408.
Shipbuilders	7,311,332.	16,301.

	Total Assets	Minimum Required Additions To Guaranty Fund
The Randolph	$ 9,986,884.	$ 23,900.
Reading	14,039,767.	32,075.
Rockland	2,656,706.	5,372.
The Roger Conant	10,459,020.	23,211.
Salem	16,323,538.	40,752.
Sandwich	22,741,144.	59,147.
Saugus	8,811,178.	20,621.
The Sharon	8,054,013.	19,030.
Shirley	3,952,380.	8,715.
Central	21,230,567.	234,834.
The Southbridge	19,198,361.	48,269.
United	43,022,808.	105,508.
Stoneham	17,116,092.	36,565.
Stoughton	12,125,938.	28,355.
Puritan	1,576,292.	4,027.
Mechanics'	10,485,982.	23,405.
Taunton	24,870,614.	53,094.
The Weir	6,823,815.	15,309.
The Baldwinville	1,432,038.	4,197.
The Martha's Vineyard	3,008,045.	7,380.
Uxbridge	5,317,730.	12,545.
Wakefield	15,278,025.	33,955.
Walpole	10,107,235.	24,516.
Middlesex Family	5,581,711.	11,550.
Ware	17,383,379.	41,026.
Wareham	5,914,497.	13,308.
The Webster	4,064,271.	9,319.
Wellesley	8,702,471.	19,879.
Westfield	21,241,618.	65,515.

	Total Assets	Minimum Required Additions To Guaranty Fund
The North Weymouth	$ 6,447,089.	$ 15,821.
South Shore	11,734,216.	27,382.
South Weymouth	6,073,539.	13,966.
Winchendon	3,138,550.	8,275.
Winchester	10,799,985.	25,270.
Woburn	16,416,749.	37,547.
Wrentham	3,305,375.	7,578.
The Cape Cod	21,482,399.	55,966.

COOPERATIVE BANKS[1]

1971

	Total Assets	Minimum Required Additions To Guaranty Fund
North Abington	$ 8,465,557.00	$ 20,184.00
Adams	8,970,451.00	22,065.00
Amesbury	4,375,844.00	10,169.00
The Arlington	27,635,487.00	73,392.00
Athol-Clinton	12,663,598.00	31,456.00
Attleborough	4,482,844.00	10,151.00
Auburn	6,479,924.00	16,109.00
Avon	4,221,693.00	10,251.00
Hyannis	65,173,607.00	189,151.00
Waverly	16,193,030.00	37,975.00
Beverly	24,972,802.00	61,118.00
Beacon	3,090,607.00	6,380.00
Brighton	27,241,842.00	66,794.00
Charlestown	2,104,872.00	4,895.00
The Commonwealth	7,183,292.00	17,265.00
Dorchester Minot	17,866,776.00	41,270.00
Enterprise	6,988,073.00	15,508.00
Farragut	5,384,198.00	13,126.00
Forest Hills	9,176,072.00	21,617.00
Haymarket	28,398,973.00	65,660.00
Hyde Park	10,447,831.00	24,880.00
Jamaica Plain	6,184,010.00	14,395.00
Joseph Warren	5,636,668.00	13,044.00
Massachusetts	13,070,202.00	31,210.00
Mattapan	54,112,945.00	177,035.00
Meeting House Hill	22,514,620.00	60,812.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Merchants	$116,931,238.00	$ 304,356.00
Mt. Vernon	23,626,927.00	56,543.00
Mt. Washington	14,634,818.00	37,212.00
Pioneer	6,706,303.00	14,084.00
Roslindale	14,057,582.00	35,548.00
Ro[x]bury-Highland	6,133,333.00	13,630.00
Telephone Workers'	10,389,965.00	24,784.00
Volunteer	32,514,142.00	83,374.00
Workingmens	107,630,122.00	266,694.00
The Braintree	21,555,834.00	49,898.00
Bridgewater	2,909,020.00	6,591.00
Campello	27,956,179.00	68,841.00
Brookline	8,706,976.00	20,607.00
Chestnut Hill	19,938,161.00	45,468.00
Coolidge Corner	20,047,858.00	47,273.00
North Cambridge	16,939,034.00	40,093.00
Reliance	29,370,152.00	66,328.00
Canton	11,460,893.00	28,330.00
Chelsea-Provident	11,280,636.00	25,579.00
Chester	1,160,442.00	2,650.00
Chicopee	5,092,348.00	11,404.00
Pilgrim	6,540,458.00	16,194.00
Concord	25,783,339.00	59,284.00
Dedham	13,395,741.00	33,223.00
North Dighton	2,412,626.00	5,640.00
East Bridgewater	2,194,241.00	4,921.00
East Hampton	2,250,364.00	4,560.00
The North Easton	6,332,684.00	15,908.00
Everett	19,432,119.00	47,298.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Glendale Square	$ 5,707,002.00	$ 12,181.00
The Fall River Peoples	12,110,345.00	29,894.00
The Lafayette	20,773,085.00	50,195.00
The Falmouth	22,319,012.00	57,824.00
Fidelity	35,405,457.00	102,072.00
Framingham	47,494,902.00	112,433.00
South Middlesex	12,508,445.00	29,953.00
Dean	5,196,074.00	15,770.00
The Chair-Town	4,221,205.00	9,435.00
Gardner	6,470,266.00	14,834.00
Gloucester	20,019,012.00	46,834.00
Grafton	4,350,789.00	9,485.00
Greenfield	24,982,425.00	60,684.00
Haverhill	24,557,993.00	60,978.00
Whittier	6,545,270.00	15,952.00
The Hingham	5,338,985.00	11,796.00
The Holbrook	7,137,857.00	17,485.00
The City	4,588,568.00	11,579.00
The Hudson	8,441,034.00	19,904.00
Hull	6,448,898.00	15,689.00
Ipswich	8,864,817.00	23,573.00
Lawrence	22,801,765.00	53,341.00
The Merrimack	15,948,887.00	39,796.00
B. F. Butler	2,006,257.00	4,125.00
Lowell	7,654,664.00	17,094.00
Equitable	20,895,825.00	50,222.00
Lincoln	16,782,871.00	40,403.00
Fellsway	7,724,485.00	17,044.00
Malden	48,694,488.00	114,827.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Mansfield	$ 15,531,315.00	$ 40,840.00
The Marblehead	4,164,677.00	10,928.00
The Marlborough	22,601,596.00	58,268.00
Community	6,302,473.00	13,194.00
Hillside-Cambridge	6,776,945.00	16,417.00
The Medford	16,344,147.00	38,076.00
Medway	5,215,432.00	12,574.00
Melrose	14,614,293.00	34,793.00
The Economy	1,224,194.00	2,751.00
Methuen	6,989,857.00	17,358.00
Middleborough	27,050,579.00	193,014.00
Millbury	1,724,059.00	3,417.00
Milton	6,056,527.00	12,689.00
The Needham	51,181,463.00	136,172.00
New Bedford-Acushnet	13,240,443.00	30,354.00
Newburyport	3,052,432.00	7,181.00
The Auburndale	10,617,020.00	26,029.00
The Newton	31,841,779.00	71,082.00
Newton South	6,742,756.00	15,949.00
The Northampton	17,920,715.00	42,472.00
Norwood	37,042,931.00	94,929.00
The George Peabody	33,065,290.00	250,020.00
The Pittsfield	39,809,545.00	97,022.00
The Granite	9,168,259.00	22,468.00
The Quincy	83,198,352.00	238,216.00
Shipbuilders	8,010,288.00	18,127.00
The Randolph	11,257,648.00	28,360.00
Reading	16,031,939.00	39,698.00
The Roger Conant	11,040,557.00	24,704.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Salem	$ 17,550,053.00	$ 45,694.00
Sandwich	25,574,024.00	66,226.00
Saugus	101,157,670.00	26,949.00
The Sharon	9,265,463.00	22,513.00
Shirley	4,073,321.00	9,306.00
Central	23,881,023.00	67,095.00
The Southbridge	20,998,258.00	53,851.00
United	46,676,158.00	110,689.00
Stoneham	19,053,070.00	46,192.00
Stoughton	13,219,436.00	31,728.00
Puritan	1,435,871.00	3,447.00
Mechanics'	12,123,534.00	31,912.00
Taunton	29,717,807.00	63,490.00
The Weir	7,863,241.00	18,243.00
The Baldwinville	1,557,274.00	3,801.00
The Martha's Vineyard	3,105,264.00	7,504.00
Uxbridge	5,739,409.00	14,271.00
Wakefield	16,845,996.00	39,734.00
Walpole	12,040,927.00	28,915.00
Middlesex Family	7,127,038.00	15,839.00
Ware	17,932,019.00	42,533.00
Wareham	5,930,670.00	13,844.00
The Webster	4,314,285.00	10,002.00
Wellesley	9,502,070.00	22,031.00
Westfield	22,484,363.00	55,569.00
The North Weymouth	7,111,679.00	16,907.00
South Shore	13,314,419.00	32,782.00
South Weymouth	6,711,969.00	16,186.00
Winchendon	3,457,334.00	9,612.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Winchester	$ 11,496,916.00	$ 27,649.00
Woburn	18,974,564.00	43,919.00
Wrentham	3,706,907.00	9,195.00
The Cape Cod	24,173,790.00	64,037.00

COOPERATIVE BANKS[1]

1972

	Total Assets	Minimum Required Additions To Guaranty Fund
North Abington	$ 9,241,847.00	$ 22,299.00
Adams	10,267,606.00	27,147.00
The Amesbury	5,193,103.00	12,336.00
The Arlington	30,778,745.00	80,600.00
Athol-Clinton	13,882,692.00	34,610.00
Auburn	7,105,704.00	17,725.00
Avon	4,835,957.00	11,328.00
Hyannis	80,476,559.00	217,312.00
Waverly	18,074,496.00	42,442.00
Beverly	27,018,777.00	68,892.00
Beacon	3,190,005.00	6,799.00
Brighton	30,364,547.00	76,568.00
Charlestown	2,433,454.00	5,321.00
The Commonwealth	8,190,477.00	18,969.00
Dorchester Minot	20,902,737.00	50,474.00
Enterprise	7,797,305.00	17,396.00
Farragut	6,358,567.00	15,245.00
Forest Hills	9,840,889.00	24,491.00
Haymarket	32,243,215.00	76,166.00
Hyde Park	12,023,701.00	27,847.00
Jamaica Plain	7,090,012.00	17,364.00
Joseph Warren	6,131,404.00	12,600.00
Massachusetts	14,099,406.00	35,568.00
Meeting House Hill	23,168,640.00	63,087.00
Merchants	123,840,336.00	313,377.00
Mt. Vernon	26,100,450.00	73,059.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Mt. Washington	$ 16,052,447.00	$ 41,080.00
Pioneer	66,200,890.00	185,570.00
Roslindale	16,421,266.00	44,242.00
Roxbury-Highland	6,632,126.00	15,014.00
Telephone Worker's	11,056,737.00	26,578.00
Volunteer	34,150,322.00	87,317.00
Workingmens	121,657,681.00	297,722.00
The Braintree	24,028,378.00	61,021.00
Bridgewater	3,121,503.00	7,209.00
Campello	30,136,726.00	76,485.00
Brookline	10,506,257.00	27,909.00
Chestnut Hill	30,065,521.00	72,561.00
Coolidge Corner	26,746,127.00	70,432.00
North Cambridge	18,776,190.00	45,424.00
Reliance	32,349,566.00	78,471.00
Canton	13,686,407.00	35,353.00
Chelsea-Provident	12,667,540.00	28,893.00
Chester	1,273,892.00	2,819.00
Chicopee	5,441,377.00	14,075.00
Pilgrim	7,669,676.00	19,086.00
Concord	31,281,352.00	77,261.00
Dedham	14,719,279.00	36,437.00
North Dighton	2,547,524.00	5,540.00
East Bridgewater	2,384,128.00	5,522.00
Easthampton	2,437,912.00	5,117.00
The North Easton	6,755,446.00	15,757.00
Everett	23,381,589.00	56,769.00
Glendale Square	6,241,320.00	14,560.00
The Lafayette	23,508,778.00	60,776.00

	Total Assets	Minimum Required Additions To Guaranty Fund
The Fall River Peoples	$ 12,932,349.00	$ 32,629.00
The Falmouth	27,207,657.00	71,774.00
Fidelity	37,979,023.00	93,959.00
Framingham	54,314,631.00	135,607.00
South Middlesex	15,765,527.00	38,098.00
Dean	5,863,588.00	14,441.00
The Chair-Town	5,073,503.00	13,481.00
Gardner	7,668,613.00	17,418.00
Gloucester	22,638,598.00	58,112.00
Grafton	4,729,575.00	-0-
Greenfield	26,964,550.00	69,529.00
Haverhill	27,706,398.00	74,464.00
Whittier	7,636,181.00	19,451.00
The Hingham	6,509,763.00	14,900.00
The Holbrook	8,057,799.00	19,132.00
The City	5,170,476.00	12,485.00
The Hudson	9,222,485.00	21,459.00
Hull	7,372,229.00	21,952.00
Ipswich	10,984,835.00	28,317.00
Lawrence	25,241,639.00	60,381.00
The Merrimack	18,604,835.00	45,623.00
B. F. Butler	2,104,843.00	4,652.00
Lowell	7,892,043.00	18,141.00
Equitable	21,909,934.00	53,315.00
Lincoln	17,088,188.00	41,877.00
Fellsway	8,503,125.00	21,383.00
Malden	59,187,149.00	143,638.00
Mansfield	17,351,469.00	45,881.00
The Marblehead	4,588,244.00	11,927.00
The Marlborough	23,667,910.00	64,273.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Community	$ 7,618,433.00	$ 15,793.00
Hillside-Cambridge	7,128,843.00	17,227.00
The Medford	18,472,967.00	44,496.00
Medway	6,030,372.00	14,664.00
Melrose	16,088,647.00	40,726.00
The Economy	1,440,564.00	3,501.00
Methuen	7,835,116.00	20,277.00
Mayflower	29,197,732.00	70,471.00
Millbury	1,854,273.00	3,713.00
Milton	6,522,862.00	14,049.00
The Needham	57,661,938.00	148,455.00
New Bedford Acushnet	15,110,433.00	-0-
Newburyport	3,462,544.00	8,145.00
The Auburndale	11,741,915.00	28,824.00
The Newton	36,344,361.00	83,879.00
Newton South	8,476,026.00	18,738.00
The Northampton	19,592,084.00	48,965.00
Norwood	40,696,533.00	109,494.00
The George Peabody	36,161,616.00	91,575.00
The Pittsfield	44,135,736.00	117,944.00
The Granite	11,043,059.00	27,553.00
The Quincy	91,191,914.00	262,732.00
Shipbuilders	9,275,530.00	22,480.00
The Randolph	14,516,941.00	35,687.00
Reading	18,018,865.00	47,204.00
The Roger Conant	11,646,335.00	27,804.00
Salem	19,193,404.00	51,113.00
Sandwich	30,837,429.00	81,094.00
Saugus	11,398,364.00	31,202.00

	Total Assets	Minimum Required Additions To Guaranty Fund
The Sharon	$ 10,604,816.00	$ 27,523.00
Shirley	4,249,167.00	9,907.00
Central	27,849,589.00	82,336.00
The Southbridge	23,535,638.00	66,817.00
United	50,603,025.00	124,600.00
Stoneham	22,701,803.00	54,912.00
Stoughton	14,978,000.00	36,128.00
Puritan	1,623,049.00	3,424.00
Mechanics	13,793,750.00	35,980.00
Taunton	42,987,664.00	83,060.00
The Weir	9,410,857.00	22,556.00
The Baldwinville	1,704.463.00	4,094.00
The Martha's Vineyard	3,574,189.00	8,862.00
Uxbridge	6,344,566.00	15,471.00
Wakefield	19,217,837.00	43,520.00
Walpole	14,728,333.00	35,927.00
Middlesex Family	8,264,815.00	20,217.00
Ware	19,402,453.00	48,722.00
Wareham	6,516,080.00	15,568.00
Webster	4,640,899.00	13,625.00
Wellesley	11,787,817.00	27,022.00
Westfield	24,397,310.00	60,606.00
The North Weymouth	7,858,936.00	20,023.00
South Shore	15,655,240.00	39,269.00
South Weymouth	8,334,209.00	19,770.00
Winchendon	3,741,717.00	10,900.00
Winchester	12,835,934.00	30,658.00
Woburn	22,262,029.00	53,859.00
Wrentham	4,899,818.00	11,069.00
The Cape Cod	30,040,511.00	81,372.00

COOPERATIVE BANKS[1]

1973

	Total Assets	Minimum Required Additions To Guaranty Fund
North Abington	$ 10,119,352.00	$ 25,909.00
Adams	11,499,165.00	29,694.00
The Amesbury	5,758,125.00	14,804.00
The Arlington	33,209,741.00	89,326.00
Athol-Clinton	14,585,296.00	36,210.00
Auburn	7,806,646.00	20,726.00
Avon	5,172,829.00	12,966.00
Hyannis	95,620,983.00	272,626.00
Waverly	22,921,838.00	57,280.00
Beverly	28,316,991.00	73,444.00
Beacon	3,980,106.00	9,173.00
Brighton	33,721,554.00	85,541.00
Charlestown	2,616,105.00	6,599.00
The Commonwealth	8,827,170.00	21,149.00
Dorchester Minot	21,836,843.00	58,640.00
Enterprise	8,236,445.00	19,296.00
Farragut	7,158,228.00	17,052.00
Forest Hills	10,530,170.00	26,117.00
Haymarket	32,456,829.00	82,233.00
Hyde Park	13,297,805.00	33,830.00
Jamaica Plain	7,687,634.00	19,861.00
Joseph Warren	6,618,303.00	14,800.00
Massachusetts	14,824,154.00	38,768.00
Meeting House Hill	23,504,488.00	61,599.00
Merchants	126,453,831.00	399,738.00
Mt. Vernon	26,672,616.00	79,121.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Mt. Washington	$ 17,392,282.00	$ 43,229.00
Pioneer	67,544,697.00	198,806.00
Roslindale	18,865,055.00	48,173.00
Roxbury-Highland	7,065,587.00	16,323.00
Telephone Workers'	11,979,353.00	28,848.00
Volunteer	34,077,708.00	93,922.00
Workingmens	132,870,815.00	347,589.00
The Braintree	26,907,113.00	69,660.00
Bridgewater	3,307,336.00	7,861.00
Campello	31,838,574.00	88,633.00
Brookline	12,626,981.00	33,229.00
Chestnut Hill	33,947,084.00	93,694.00
Coolidge Corner	30,013,889.00	89,921.00
North Cambridge	19,949,779.00	51,552.00
Reliance	35,820,303.00	90,229.00
Canton	15,570,074.00	40,914.00
Chelsea-Provident	14,018,143.00	35,177.00
Chester	1,324,110.00	3,215.00
Chicopee	5,979,187.00	15,203.00
Pilgrim	7,891,175.00	20,322.00
Concord	38,823,445.00	96,616.00
Dedham	16,758,709.00	41,932.00
North Dighton	2,727,784.00	5,769.00
East Bridgewater	2,631,948.00	6,074.00
East Hampton	2,663,487.00	5,727.00
The North Easton	7,539,558.00	18,801.00
Everett	25,960,729.00	68,038.00
Glendale Square	6,824,079.00	16,986.00
The Fall River Peoples	13,543,699.00	35,345.00

	Total Assets	Minimum Required Additions To Guaranty Fund
The Lafayette	$ 26,718,830.00	$ 66,728.00
The Falmouth	30,335,240.00	85,198.00
Fidelity	39,776,063.00	103,429.00
Framingham	58,944,374.00	154,340.00
South Middlesex	18,712,216.00	45,666.00
Dean	6,154,261.00	16,225.00
The Chair-Town	5,947,819.00	10,370.00
Gardner	8,692,727.00	21,070.00
Gloucester	26,633,668.00	66,732.00
Grafton	5,001,266.00	-0-
Greenfield	29,066,060.00	76,451.00
Haverhill	30,713,679.00	84,767.00
Whittier	9,198,594.00	24,180.00
The Hingham	7,097,026.00	17,046.00
The Holbrook	8,733,100.00	22,083.00
The City	5,794,114.00	14,817.00
The Hudson	10,399,943.00	24,699.00
Hull	8,240,420.00	21,610.00
Ipswich	12,477,354.00	33,441.00
Lawrence	27,875,994.00	69,655.00
The Merrimack	22,594,999.00	56,818.00
B. F. Butler	2,638,439.00	5,738.00
Lowell	8,232,621.00	20,454.00
Equitable	23,107,192.00	58,202.00
Lincoln	16,810,644.00	41,156.00
Fellsway	9,105,170.00	23,202.00
Malden	69,939,995.00	173,032.00
Mansfield	20,946,165.00	51,461.00
The Marblehead	4,932,233.00	12,125.00

	Total Assets	Minimum Required Additions To Guaranty Fund
The Marlborough	$ 24,359,350.00	$ 68,045.00
Community	8,543,447.00	18,743.00
Hillside-Cambridge	8,595,095.00	21,089.00
The Medford	21,652,570.00	51,632.00
Medway	7,138,600.00	17,093.00
Melrose	17,131,357.00	45,033.00
The Economy	1,764,233.00	4,181.00
Methuen	9,103,674.00	23,450.00
Mayflower	32,121,714.00	78,022.00
Millbury	2,129,781.00	4,317.00
Milton	7,142,724.00	15,894.00
The Needham	64,930,726.00	177,490.00
New Bedford Acushnet	16,257,024.00	-0-
Newburyport	4,039,991.00	9,867.00
The Auburndale	12,284,537.00	31,395.00
The Newton	39,235,443.00	98,206.00
Newton South	9,867,697.00	26,158.00
The Northampton	22,084,505.00	56,483.00
Norwood	44,255,865.00	117,804.00
The George Peabody	39,606,412.00	102,903.00
The Pittsfield	48,123,000.00	134,324.00
The Granite	12,331,055.00	32,948.00
The Quincy	94,188,285.00	287,354.00
Shipbuilders	10,009,938.00	25,518.00
The Randolph	15,317,602.00	41,570.00
Reading	20,388,651.00	53,695.00
The Roger Conant	12,561,738.00	30,598.00
Salem	20,588,077.00	56,851.00
Sandwich	36,382,203.00	96,578.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Saugus	$ 12,711,256.00	$ 34,132.00
The Sharon	12,114,495.00	31,865.00
Shirley	4,480,199.00	-19,385.00
Central	30,664,121.00	86,800.00
The Southbridge	25,687,260.00	72,300.00
United	54,346,260.00	138,248.00
Stoneham	28,396,802.00	69,855.00
Stoughton	17,368,483.00	42,133.00
Puritan	1,955,481.00	4,863.00
Mechanics	15,315,644.00	44,464.00
Taunton	53,188,786.00	123,165.00
The Weir	11,126,237.00	28,714.00
The Baldwinville	1,900,865.00	4,524.00
The Martha's Vineyard	4,009,175.00	10,192.00
Uxbridge	6,902,347.00	17,377.00
Wakefield	21,837,442.00	54,459.00
Walpole	17,459,051.00	45,830.00
Middlesex Family	9,751,009.00	22,597.00
Ware	20,605,260.00	54,128.00
Wareham	6,846,034.00	17,484.00
Webster	4,914,430.00	12,388.00
Wellesley	14,002,019.00	32,469.00
Westfield	27,312,311.00	67,241.00
The No. Weymouth	8,532,893.00	21,314.00
South Shore	16,202,729.00	43,706.00
South Weymouth	10,313,603.00	25,908.00
Winchendon	3,905,301.00	11,900.00
Winchester	14,274,691.00	36,104.00
Woburn	26,422,617.00	65,175.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Wrentham	$ 5,866,256.00	$ 14,053.00
The Cape Cod	36,576,171.00	98,376.00

COOPERATIVE BANKS[1]

1974

	Total Assets	Minimum Required Additions To Guaranty Fund
North Abington	$ 10,454,515.	$ 27,626.
Adams	12,629,022.	34,837.
The Amesbury	6,278,224.	16,817.
The Arlington	34,055,107.	97,141.
Athol-Clinton	15,366,756.	40,611.
Auburn	8,103,065.	22,345.
Avon	5,739,086.	14,428.
Hyannis	104,396,139.	315,126.
Waverly	24,715,640.	64,915.
Beverly	28,340,579.	80,845.
Beacon	3,923,247.	11,441.
Brighton	34,252,816.	94,415.
Charlestown	2,941,433.	7,581.
The Commonwealth	9,588,129.	23,851.
Dorchester Minot	22,879,379.	62,314.
Enterprise	8,764,779.	20,897.
Farragut	7,230,142.	18,183.
Forest Hills	10,752,352.	28,253.
Haymarket	31,398,533.	39,109.
Hyde Park	14,503,404.	37,824.
Jamaica Plain	8,231,437.	21,896.
Joseph Warren	6,538,123.	15,400.
Massachusetts	15,606,539.	49,622.
Meeting House Hill	23,652,452.	62,325.
Merchants	125,413,531.	352,183.
Mt. Vernon	24,468,593.	70,964.
Mt. Washington	17,077,307.	45,910.

	Total Assets	Minimum Required Additions To Guaranty Fund
Pioneer	$ 60,045,121.	$ 185,227.
Roslindale	19,094,319.	50,397.
Ro[x]bury-Highland	7,395,662.	17,571.
Telephone Workers'	12,164,353.	32,270.
Volunteer	34,465,579.	89,616.
Workingmens	133,774,588.	399,729.
The Braintree	28,792,907.	78,047.
Bridgewater	3,398,325.	11,172.
Campello	32,387,526.	86,873.
Brookline	13,458,548.	39,542.
Chestnut Hill	27,738,054.	82,854.
Coolidge Corner	27,898,230.	93,441.
North Cambridge	20,827,131.	58,639.
Reliance	34,325,504.	94,432.
Canton	16,277,534.	72,200.
Chelsea-Provident	15,035,555.	38,854.
Chester	1,366,337.	3,516.
Chicopee	6,421,276.	16,922.
Pilgrim	7,883,000.	21,411.
Concord	41,143,994.	94,754.
Dedham	16,845,759.	47,270.
North Dighton	2,728,515.	6,473.
East Bridgewater	2,781,114.	7,022.
East Hampton	2,602,959.	6,330.
The North Easton	7,329,733.	21,453.
Everett	27,519,113.	73,872.
Glendale Square	7,731,878.	19,355.
The Fall River Peoples	13,252,457.	35,692.
The Lafayette	28,333,615.	76,657.

	Total Assets	Minimum Required Additions To Guaranty Fund
The Falmouth	$ 30,501,076.	$ 92,738.
Fidelity	39,450,982.	110,561.
Framingham	63,790,152.	176,904.
South Middlesex	18,295,374.	46,667.
Dean	6,330,674.	17,295.
The Chair-Town	6,724,081.	17,758.
Gardner	9,120,232.	23,652.
Gloucester	28,560,910.	79,088.
Grafton	5,753,257.	-0-
Greenfield	29,172,920.	83,144.
Haverhill	31,061,137.	93,786.
Whittier	9,419,972.	27,784.
The Hingham	6,888,293.	18,172.
The Holbrook	8,712,731.	24,682.
The City	5,788,392.	17,247.
The Hudson	11,194,085.	29,058.
Hull	8,695,442.	25,543.
Ipswich	13,143,246.	38,855.
Lawrence	28,820,998.	84,414.
The Merrimack	22,890,333.	66,000.
B. F. Butler	2,925,645.	7,108.
Lowell	8,900,288.	23,126.
Equitable	23,396,487.	63,409.
Lincoln	15,898,503.	42,665.
Fellsway	9,030,694.	24,203.
Malden	72,599,168.	188,188.
Mansfield	20,604,990.	58,348.
The Marblehead	4,884,280.	13,524.
The Marlborough	24,843,749.	74,478.

	Total Assets	Minimum Required Additions To Guaranty Fund
Community	$ 8,519,686.	$ 21,111.
Hillside-Cambridge	9,462,428.	26,610.
The Medford	23,520,464.	62,674.
Medway	7,795,506.	20,071.
Melrose	17,267,748.	47,174.
The Economy	1,880,514.	6,239.
Methuen	9,482,717.	26,997.
Mayflower	33,741,968.	71,889.
Millbury	2,150,758.	4,690.
Milton	7,673,962.	19,845.
The Needham	66,372,990.	206,300.
New Bedford Acushnet	15,868,211.	-0-
Newburyport	4,395,942.	11,567.
The Auburndale	12,288,507.	34,319.
The Newton	41,042,530.	108,649.
Newton South	10,296,135.	29,116.
The Northampton	23,880,385.	65,820.
Norwood	47,265,838.	134,948.
The George Peabody	40,633,072.	115,226.
The Pittsfield	49,838,661.	147,863.
The Granite	13,196,922.	39,403.
The Quincy	92,352,793.	297,924.
Shipbuilders	10,537,704.	29,130.
The Randolph	16,088,312.	48,160.
Reading	21,791,722.	61,007.
The Roger Conant	12,599,387.	32,767.
Salem	21,081,798.	62,001.
Sandwich	38,517,280.	110,008.
Saugus	13,376,360.	41,120.

	Total Assets	Minimum Required Additions To Guaranty Fund
The Sharon	$ 12,349,327.	$ 35,662.
Shirley	4,474,037.	12,084.
Central	31,322,506.	93,658.
The Southbridge	26,963,407.	76,948.
United	54,670,281.	149,105.
Stoneham	29,609,443.	80,251.
Stoughton	17,669,638.	48,700.
Puritan	1,886,298.	5,130.
Mechanics	16,686,391.	46,613.
Taunton	59,058,624.	149,517.
The Weir	11,931,213.	35,424.
The Baldwinville	2,070,168.	5,312.
The Martha's Vineyard	4,293,637.	12,406.
Uxbridge	7,753,475.	24,167.
Wakefield	22,866,206.	60,226.
Walpole	19,503,654.	56,369.
Middlesex Family	10,272,550.	34,462.
Ware	20,897,107.	61,570.
Wareham	6,880,779.	18,787.
Webster	4,995,764.	12,808.
Wellesley	14,654,052.	39,420.
Westfield	27,521,177.	76,561.
The No. Weymouth	8,883,046.	24,350.
South Shore	16,681,333.	45,385.
South Weymouth	11,432,445.	30,281.
Winchendon	3,740,752.	12,400.
Winchester	15,408,680.	41,455.
Woburn	29,250,223.	80,659.
Wrentham	6,372,767.	19,499.
The Cape Cod	36,644,275.	111,828.

COOPERATIVE BANKS[1]

1975

	Total Assets	Minimum Required Additions To Guaranty Fund
North Abington	$ 11,792,137.	$ 30,454.
Adams	14,226,309.	38,416.
The Amesbury	6,488,797.	18,415.
The Arlington	34,243,474.	93,882.
Athol-Clinton	16,153,204.	42,740.
Auburn	8,200,202.	23,473.
Avon	6,220,304.	16,220.
Hyannis	112,241,953.	341,407.
Waverly	27,220,535.	64,849.
Beverly	27,900,621.	78,271.
Beacon	3,375,865.	10,286.
Brighton	35,605,584.	97,919.
Charlestown	3,060,676.	10,543.
The Commonwealth	9,924,310.	26,443.
Enterprise	9,273,104.	23,566.
Farragut	7,874,490.	19,530.
Forest Hills	10,828,747.	30,631.
Haymarket	30,520,591.	83,280.
Hyde Park	15,047,904.	40,622.
Jamaica Plain	8,764,379.	23,352.
Joseph Warren	6,622,500.	17,400.
Massachusetts	15,004,839.	43,210.
Meeting House Hill	24,226,298.	61,924.
Merchants	147,542,335.	358,952.
Mt. Vernon	22,436,061.	55,124.
Mt. Washington	17,545,266.	47,837.

	Total Assets	Minimum Required Additions To Guaranty Fund
Pioneer	$ 57,342,958.	$ 162,911.
Roslindale	20,479,937.	53,597.
Ro[x]bury-Highland	7,824,594.	18,553.
Telephone Workers'	12,487,510.	33,965.
Volunteer	33,018,036.	79,157.
Workingmens	138,902,459.	363,213.
The Braintree	30,090,126.	86,605.
Bridgewater	3,408,993.	9,143.
Campello	33,218,208.	90,994.
Brookline	13,862,388.	42,653.
Chestnut Hill	26,480,350.	71,956.
Coolidge Corner	28,437,601.	87,801.
North Cambridge	21,425,627.	66,286.
Reliance	34,571,620.	92,070.
Canton	17,659,553.	51,530.
Chelsea-Provident	15,283,088.	41,446.
Chester	1,275,885.	3,688.
Chicopee	7,071,715.	13,485.
Pilgrim	8,142,891.	22,050.
Concord	44,114,579.	121,292.
Dedham	17,409,656.	49,154.
North Dighton	2,772,111.	6,510.
East Bridgewater	2,822,567.	7,765.
East Hampton	2,670,380.	6,970.
The North Easton	8,371,298.	23,437.
Everett	29,035,744.	147,138.
Glendale Square	8,093,567.	22,735.
The Fall River Peoples	13,211,364.	35,730.
The Lafayette	28,877,255.	81,876.

	Total Assets	Minimum Required Additions To Guaranty Fund
The Falmouth	$ 31,965,423.	$ 93,254.
Fidelity	41,117,389.	112,654.
Framingham	64,969,384.	192,665.
South Middlesex	17,860,714.	56,253.
Dean	6,307,764.	18,412.
The Chair-Town	7,204,354.	18,381.
Gardner	9,405,244.	25,307.
Gloucester	30,807,165.	85,611.
Grafton	5,545,322.	-0-
Greenfield	29,501,086.	83,756.
Haverhill	32,457,806.	98,893.
Whittier	10,319,641.	29,251.
The Hingham	6,786,453.	17,665.
The Holbrook	9,061,155.	23,668.
The City	6,130,535.	17,090.
The Hudson	12,078,349.	32,865.
Hull	9,234,876.	28,258.
Ipswich	13,844,757.	40,855.
Lawrence	28,334,138.	80,206.
The Merrimack	23,697,845.	68,963.
B. F. Butler	3,090,870.	7,729.
Lowell	10,103,108.	26,898.
Equitable	23,740,582.	64,926.
Lincoln	15,315,313.	43,820.
Fellsway	9,535,562.	26,030.
Malden	78,242,572.	207,135.
Mansfield	23,122,292.	63,071.
The Marlborough	26,565,331.	80,507.
Community	8,691,453.	21,812.

	Total Assets	Minimum Required Additions To Guaranty Fund
Hillside-Cambridge	$ 9,480,435.	$ 26,330.
The Medford	25,733,928.	69,879.
Medway	8,641,829.	22,721.
Melrose	18,701,285.	48,318.
The Economy	2,076,355.	5,523.
Methuen	9,778,471.	29,110.
Mayflower	34,435,168.	88,198.
Millbury	2,090,518.	4,906.
Milton	8,015,413.	20,943.
The Needham	70,239,965.	203,786.
New Bedford Acushnet	15,987,604.	-0-
Newburyport	4,578,463.	13,192.
The Auburndale	13,007,261.	35,027.
The Newton	45,385,323.	112,769.
Newton South	10,721,482.	29,293.
The Northampton	24,483,838.	71,273.
Norwood	48,340,106.	139,246.
The George Peabody	42,727,006.	119,970.
The Pittsfield	51,553,034.	146,977.
The Granite	14,255,950.	39,825.
The Quincy	93,819,620.	288,436.
Presidential	11,021,348.	30,992.
The Randolph	16,350,401.	53,778.
Reading	22,760,593.	65,396.
The Roger Conant	12,710,197.	32,732.
Heritage	26,401,469.	74,173.
Sandwich	42,004,669.	124,246.
Saugus	14,265,508.	39,806.
The Sharon	12,223,122.	35,995.

	Total Assets	Minimum Required Additions To Guaranty Fund
Shirley	$ 4,495,415.	$ 11,764.
Central	33,390,756.	97,193.
The Southbridge	28,999,650.	82,715.
United	55,838,896.	149,820.
Stoneham	31,058,535.	86,307.
Stoughton	19,026,443.	51,667.
Puritan	1,859,256.	3,596.
Mechanics	18,102,052.	50,272.
Taunton	60,102,824.	163,889.
The Weir	12,588,910.	35,308.
The Baldwinville	2,122,416.	5,909.
The Martha's Vineyard	4,514,138.	13,266.
Uxbridge	8,453,780.	22,775.
Wakefield	24,708,025.	66,765.
Walpole	22,169,733.	62,990.
Middlesex Family	10,867,066.	32,333.
Ware	21,552,474.	58,368.
Wareham	7,034,924.	19,701.
Webster	5,240,395.	13,478.
Wellesley	14,839,512.	38,860.
Westfield	28,030,314.	83,096.
The No. Weymouth	9,247,893.	25,332.
South Shore	16,583,818.	44,070.
South Weymouth	12,049,230.	32,523.
Winchendon	3,927,899.	12,500.
Winchester	16,272,813.	43,853.
Woburn	32,532,859.	86,768.
Wrentham	7,060,030.	19,390.
The Cape Cod	39,411,528.	118,152.

(B) SAVINGS BANKS

SAVINGS BANKS[1]

1968

	Total Assets	Minimum Required Additions To Guaranty Fund
Abington	$ 24,174,573.22	$ 17,000.00
South Adams	17,462,503.23	39,013.24
Provident Institution for Savings in the Towns of Salisbury and Amesbury	12,925,932.69	16,041.00
Amherst	50,697,057.71	107,338.07
The Andover	53,306,875.94	116,500.00
Arlington Five Cents	82,973,563.91	184,047.83
Athol	25,779,088.63	33,000.00
North Middlesex	19,443,763.24	42,025.00
Barre	7,354,285.12	16,340.53
Belmont	28,899,446.30	66,000.00
Beverly	71,194,839.70	-0-
The Boston Five Cents	46,170,266.02	-0-
Brighton Five Cents	46,170,266.02	126,100.00
Charlestown	448,665,134.05	953,526.00
Dorchester	141,758,067.50	307,900.00
East Boston	73,003,809.77	120,900.00
Eliot	67,104,038.84	143,895.00
Grove Hall	43,899,921.22	25,750.00
The Hibernia	12,132,131.84	34,001.06
Home	309,153,648.32	664,400.00
The Hyde Park	38,162,475.74	80,350.00
Lincoln	6,069,436.68	6,152.20
The Provident Institution for Savings in the Town of Boston	632,833,883.96	1,378,000.00

	Total Assets	Minimum Required Additions To Guaranty Fund
South Boston	$ 144,055,330.77	$ 324,000.00
Suffolk Frankin	401,488,432.44	228,000.00
Union Savings Bank of Boston	119,882,960.98	272,164.17
Warren Institution for Savings	107,006,570.11	247,700.00
Wildey	49,034,195.75	135,549.28
The Braintree	23,576,882.52	52,400.00
Bridgewater	18,390,582.29	40,400.00
Brockton	65,533,525.98	141,400.00
People's Savings Bank of Brockton	34,154,322.68	74,600.00
Brookline Savings Bank (Brookline)		179,300.00
Cambridge	168,450,070.62	-0-
Cambridgeport	125,703,065.00	269,900.00
East Cambridge	56,950,004.82	-0-
North Avenue	54,772,503.45	120,410.00
The Canton Institution for Savings	10,003,251.90	21,250.00
Chelsea	70,389,532.66	105,000.00
County	23,744,413.89	52,100.00
Chicopee	36,100,327.26	77,083.95
Clinton	20,658,883.86	46,937.59
Cohasset	11,730,390.28	31,500.00
The Middlesex Institution for Savings	38,880,825.70	85,500.00
Conway	7,924,127.42	18,000.00
Danvers	41,816,069.21	97,500.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Dedham Institution for Savings	$ 76,155,467.31	$ 167,000.00
East Bridgewater	15,090,674.29	33,700.00
Easthampton	47,940,211.33	102,500.00
North Easton	13,228,834.18	-0-
Dukes County	7,031,518.44	15,731.00
Everett	30,795,560.17	63,000.00
Fairhaven Institution for Savings	70,867,752.59	155,000.00
The Citizens' Savings Bank	61,094,819.08	129,034.08
Fall River	49,208,041.94	105,917.88
Fall River Five Cents	42,563,253.03	23,942.30
Union	30,523,603.60	-0-
Fitchburg	59,929,019.25	142,200.00
The Worcester North Savings Institution	62,501,570.45	-0-
Foxborough	10,536,908.26	23,537.51
Framingham Savings Bank (Framingham)		143,000.00
Benjamin Franklin	15,455,162.49	33,385.41
The Gardner	40,248,066.65	-0-
Georgetown	8,424,244.09	19,097.00
Cape Ann	34,674,303.56	76,300.00
Great Barrington	35,954,814.89	79,000.00
The Franklin Savings Institution	44,395,930.10	24,700.00
Greenfield	35,129,556.72	98,500.00
Cape Cod Five Cents	49,330,197.87	107,890.44
Haverhill	91,747,731.67	196,500.00
Pentucket Five Cents	32,264,213.48	69,639.56

	Total Assets	Minimum Required Additions To Guaranty Fund
The Hingham Institution for Savings	$ 20,663,010.19	$ 33,220.28
Holyoke	92,840,528.10	197,385.02
Falls-Mechanics'	99,541,905.61	215,849.05
Peoples	77,107,137.75	167,000.00
Holliston-Hopkinton	8,446,335.81	18,798.68
Hudson	23,774,447.88	39,000.00
Ipswich	19,021,383.09	41,300.00
Community	23,253,696.76	50,000.00
Essex Broadway	128,919,779.24	-0-
Lawrence	84,664,553.54	183,610.00
Lee	27,911,681.73	60,000.00
Leicester	7,610,045.26	615.89
Lenox	12,724,554.67	27,843.29
Leominster	36,791,266.31	81,500.00
Lexington	32,940,762.27	73,755.14
The Central	84,079,103.43	190,000.00
The Lowell Five Cent	76,424,233.31	170,250.00
Lowell Institution for Savings	43,559,270.54	97,309.76
Washington	19,974,184.90	44,100.00
Ludlow	48,667,851.58	105,000.00
Lynn Five Cents	110,454,354.65	305,500.00
Lynn Institution for Savings	137,234,434.53	296,174.83
Malden	107,398,003.94	-0-
Marblehead	24,655,647.38	53,000.00
Marlborough	32,488,957.31	71,493.18
Assabet Institution for Savings	20,116,157.35	44,900.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Medford	$ 55,359,831.52	$ 123,600.00
Medway	7,496,197.12	16,400.00
Melrose	62,053,813.23	136,564.99
Merrimac	2,851,664.92	-0-
Middleborough	9,021,389.52	20,450.00
Milford	33,464,035.63	74,800.00
Millbury	11,862,743.99	25,291.09
Milton	51,908,058.39	120,000.00
Monson	11,594,733.71	-0-
Nantucket Institution for Savings	13,731,550.68	36,359.38
Natick Five Cents	48,282,591.86	105,900.00
New Bedford Five Cents	106,311,340.25	-0-
New Bedford Institution for Savings	161,206,885.14	100,000.00
Institution for Savings, in Newburyport and its Vicinity	33,325,227.72	95,470.92
Newburyport Five Cents	25,652,452.15	56,100.00
Newton	201,155,551.81	441,639.02
West Newton	53,041,500.15	150,000.00
North Adams Hoosac	47,658,005.37	105,200.00
Florence	23,287,452.11	50,300.00
Nonotuck	24,488,977.49	53,400.00
Northampton Institution for Savings	38,502,874.56	-0-
Attleborough	62,746,205.94	136,700.00
Whitinsville	21,708,574.43	46,446.00
North Brookfield	8,093,422.27	17,177.70

	Total Assets	Minimum Required Additions To Guaranty Fund
South Scituate	$ 9,983,263.47	$ 22,250.00
Orange	7,780,868.07	17,205.74
Palmer	31,810,497.30	40,000.00
Warren Five Cents	59,117,145.09	127,600.00
Berkshire County	76,470,638.12	159,250.00
City Savings Bank of Pittsfield	75,394,403.44	161,543.05
Plymouth	15,189,826.99	31,965.21
Plymouth Five Cents	30,706,043.94	67,300.00
Seamen's Savings	14,624,064.96	37,974.00
Quincy	96,849,236.42	211,600.00
Randolph	25,031,743.92	56,589.14
Reading	20,109,757.59	46,000.00
Rockland	19,622,193.95	21,999.00
Granite	6,891,332.55	14,719.00
Salem	93,931,281.81	-0-
Shelburne Falls	8,540,202.80	19,050.00
Salem Five Cents	150,181,374.69	327,036.14
Somerset	18,208,474.95	40,390.28
Somerville	32,939,489.71	-0-
Southbridge	30,793,932.72	69,400.00
Spencer	13,854,214.54	29,450.00
Hampden	47,442,247.15	106,000.00
Springfield Five Cents	104,489,026.37	230,000.00
Springfield Institution for Savings	296,773,852.77	610,986.00
Stoneham	27,589,864.72	59,902.48
Bristol County	38,505,284.61	92,800.00
Taunton	27,684,829.42	-0-

	Total Assets	Minimum Required Additions To Guaranty Fund
Uxbridge	$ 18,273,000.74	$ 5,000.00
Wakefield	42,982,412.51	96,000.00
Waltham	68,493,365.12	159,200.00
Ware	68,758,347.96	141,700.00
Wareham	55,095,544.39	120,100.00
Warren	6,885,453.89	-0-
Watertown	45,993,245.69	103,000.00
Webster Five Cents	34,714,675.63	75,650.00
Wellfleet	7,775,808.81	17,200.00
Westborough	19,004,019.38	41,500.00
Westfield	55,537,584.60	121,150.00
Woronco	40,515,683.96	89,700.00
East Weymouth	12,936,932.06	28,193.39
South Weymouth	36,344,321.29	78,277.00
Weymouth	30,782,759.14	67,533.38
Whitman	21,596,170.12	-0-
Haydenville	4,721,536.51	5,400.00
Williamstown	22,676,294.32	51,307.60
Winchendon	17,655,230.89	-0-
Winchester	36,512,947.40	77,000.00
Winthrop	17,835,393.19	38,956.36
Woburn Five Cents	33,109,733.13	73,000.00
Bay State	41,919,164.50	90,000.00
People's Savings Bank, in the City of Worcester	130,495,467.37	100.00
Worcester County Institution for Savings	247,414,334.03	527,952.37
Worcester Five Cents	166,787,114.23	-0-
Worcester Mechanics	96,867,010.47	161,000.00
Bass River	87,811,337.40	191,668.34

SAVINGS BANKS[1]

1969

	Total Assets	Minimum Required Additions To Guaranty Fund
Abington	$ 27,134,278.23	$ -0-
South Adams	18,274,900.19	40,487.31
Provident Institution for Savings in the Towns of Salisbury and Amesbury	13,445,770.70	26,651.00
Amherst	57,110,376.38	118,975.84
The Andover	59,331,202.97	127,750.00
Arlington Five Cents	92,114,759.95	200,719.76
Athol	27,030,915.41	60,000.00
North Middlesex	20,654,462.13	45,000.00
Barre	7,784,993.31	16,906.58
Belmont	30,151,614.32	86,509.62
Beverly	75,580,862.50	41,600.00
The Boston Five Cents	644,710,807.03	355,109.00
Brighton Five Cents	44,664,074.50	101,900.00
Charlestown	484,512,526.35	1,029,978.00
Dorchester	209,772,104.47	459,148.41
East Boston	77,829,353.76	172,100.00
Eliot	69,926,301.41	158,400.00
Grove Hall	42,479,043.19	25,200.00
The Hibernia	13,892,485.55	30,142.19
Home	335,820,787.82	744,000.00
The Hyde Park	41,754,306.83	87,800.00
Lincoln	6,138,555.22	13,025.67
The Provident Institution for Savings in the Town of Boston	665,312,080.96	1,448,300.00

	Total Assets	Minimum Required Additions To Guaranty Fund
South Boston	$ 175,856,342.92	$ 372,200.00
Suffolk Franklin	412,265,095.82	622,955.00
Union Warren	238,181,641.54	530,139.43
The Braintree	27,559,800.67	57,100.00
Bridgewater	19,118,095.22	31,100.00
Brockton	73,705,205.55	157,000.00
People's Savings Bank of Brockton	36,032,651.29	76,350.00
Brookline	85,101,747.66	190,400.00
Cambridge	167,788,310.80	-0-
Cambridgeport	147,314,485.65	315,500.00
East Cambridge	63,631,569.55	125,383.83
North Avenue	5[illegible]057,277.10	-0-
The Canton Institution for Savings	10,866,923.44	23,330.00
Chelsea-County	103,881,042.20	87,300.00
Chicopee	39,805,419.82	81,781.26
Clinton	22,483,722.42	50,296.75
Cohasset	12,442,249.70	27,200.00
The Middlesex Institution for Savings	41,639,350.27	93,000.00
Conway	8,202,349.55	18,200.00
Danvers	46,507,371.30	75,000.00
Dedham Institution for Savings	79,009,104.81	173,100.00
East Bridgewater	15,754,134.97	35,200.00
Easthampton	52,351,715.53	138,800.00
North Easton	14,337,671.41	25,000.00
Dukes County	7,878,886.02	15,588.19

	Total Assets	Minimum Required Additions To Guaranty Fund
Everett	$ 35,618,976.65	$ 75,300.00
Fairhaven Institution for Savings	76,500,064.50	171,500.00
The Citizens'	65,260,695.58	138,423.80
Fall River	52,488,340.84	114,333.02
Fall River Five Cents	46,120,029.59	101,000.00
Union	32,617,430.06	-0-
Fitchburg	62,520,460.52	139,200.00
The Worcester North Savings Institution	64,429,047.59	-0-
Foxborough	11,244,677.34	26,517.00
Framingham	70,073,733.19	158,000.00
Benjamin Franklin	16,202,841.80	43,930.29
The Gardner	45,213,428.35	55,100.00
Georgetown	8,941,265.88	19,728.00
Cape Ann	38,212,568.08	81,950.00
Great Barrington	39,219,063.51	86,500.00
The Franklin Savings Institution	47,330,305.66	52,000.00
Greenfield	38,212,437.97	81,600.00
Cape Cod Five Cents	54,843,261.32	119,700.00
Haverhill	97,688,562.96	212,000.00
Pentucket Five Cents	33,751,915.93	72,548.19
The Hingham Institution for Savings	22,406,294.09	48,560.92
Community Savings	108,642,946.60	231,103.86
People's	82,190,264.39	178,500.00
Holyoke	96,793,225.69	257,922.86
Holliston-Hopkinton	8,865,216.04	19,943.14
Hudson	25,098,468.02	55,300.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Ipswich	$ 19,950,438.81	$ 43,800.00
Community	24,326,620.82	70,000.00
Essex Broadway	134,051,299.84	-0-
Lawrence	90,594,195.82	195,610.00
Lee	29,265,268.96	62,500.00
Leicester	7,704,172.86	-0-
Lenox	13,268,635.93	29,051.71
Leominster	37,831,726.59	85,500.00
Lexington	38,311,545.15	79,927.20
The Central	87,556,662.41	195,000.00
The Lowell Five Cents	79,850,556.36	178,650.00
Lowell Institution for Savings	50,143,434.05	107,499.79
Washington	20,946,545.48	46,000.00
Ludlow	53,611,917.06	111,300.00
Lynn Five Cents	113,757,202.52	251,500.00
Lynn Institution for Savings	144,439,391.38	312,019.40
Malden	115,421,411.81	890.51
Marblehead	26,889,622.90	59,000.00
Marlborough	35,258,353.99	76,918.86
Assabet Institution for Savings	22,357,668.08	49,500.00
Medford	61,769,642.29	136,100.00
Medway	8,272,955.61	17,300.00
Melrose	64,842,815.75	143,023.72
Merrimac	3,023,209.47	-0-
Middleborough	9,469,207.27	21,400.00
Milford	36,276,770.11	80,150.00
Millbury	12,304,875.06	26,036.56

	Total Assets	Minimum Required Additions To Guaranty Fund
Milton	$ 61,382,208.03	$ 134,000.00
Monson	12,398,361.17	-0-
Nantucket Institution for Savings	15,208,363.74	32,653.79
Natick Five Cents	51,916,523.39	114,100.00
New Bedford Five Cents	116,896,474.66	255,500.00
New Bedford Institution for Savings	175,478,323.11	400,000.00
Institution for Savings, in Newburyport and its Vicinity	35,322,049.11	137,276.23
Newburyport Five Cents	26,912,154.37	57,200.00
Newton	221,803,633.15	598,352.76
West Newton	56,493,669.42	127,000.00
North Adams Hoosac	50,420,314.53	110,100.00
Florence	24,792,623.59	55,200.00
Nonotuck	25,246,759.45	55,900.00
Northampton Institution for Savings		-0-
Attleborough	68,555,414.03	147,250.00
Whitinsville	23,508,506.33	50,036.00
North Brookfield	8,787,864.98	23,219.87
South Scituate	10,147,817.44	24,000.00
Orange	8,322,693.01	18,121.35
Palmer	34,193,409.04	55,000.00
Warren Five Cents	64,531,590.10	137,906.14
Berkshire County	82,175,176.67	172,925.00
City Savings Bank of Pittsfield	79,235,500.78	170,689.41
Plymouth	17,852,869.30	36,718.08

	Total Assets	Minimum Required Additions To Guaranty Fund
Plymouth Five Cents	$ 34,854,530.18	$ 74,900.00
Seamen's	15,504,070.91	32,939.53
Quincy	106,559,224.78	227,300.00
Randolph	27,874,033.30	61,703.52
Reading	21,830,572.72	49,500.00
Rockland	20,923,562.36	46,214.00
Granite	7,464,618.52	16,194.00
Salem	98,991,148.87	-0-
Salem Five Cents	165,373,882.57	356,056.71
Shelburne Falls	9,218,611.52	20,455.00
Somerset	19,968,641.67	42,145.34
Somerville	34,789,298.24	-0-
Southbridge	33,877,673.38	74,200.00
Spencr	15,174,383.63	32,500.00
Hampden	49,679,203.03	112,000.00
Springfield Five Cents	109,387,804.12	298,500.00
Springfield Institution for Savings	319,438,927.31	838,091.00
Stoneham	29,851,055.64	64,658.59
Bristol County	41,882,632.76	93,000.00
Taunton	28,574,733.55	33,449.37
Uxbridge	19,577,369.92	10,300.00
Wakefield	46,044,299.93	102,000.00
Waltham	73,344,591.71	165,000.00
Ware	77,296,694.69	155,500.00
Wareham	59,710,427.34	129,300.00
Warren	7,297,492.18	-0-
Watertown	50,228,504.03	111,000.00
Webster	37,744,146.10	81,250.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Wellfleet	$ 8,261,527.24	$ 18,500.00
Westborough	20,584,207.13	44,800.00
Westfield	59,412,935.36	160,175.00
Woronoco	43,996,478.60	94,900.00
East Weymouth	14,601,766.79	31,640.94
South Weymouth	39,796,209.52	84,550.00
Weymouth	33,534,716.16	73,416.31
Whitman	23,927,185.92	-0-
Williamstown	23,241,544.09	52,075.86
Haydenville	4,963,689.47	10,900.00
Winchendon	19,053,832.55	50,832.13
Winchester	37,983,206.21	82,800.00
Winthrop	21,141,417.26	45,488.61
Woburn Five Cents	37,089,962.04	80,200.00
Bay State	46,063,612.62	98,000.00
People's Savings Bank in the City of Worcester	139,043,514.50	-0-
Worcester County Institution for Savings	255,963,232.90	546,846.00
Worcester Five Cents	181,487,660.16	-0-
Worcester Mechanics	102,888,890.89	171,000.00
Bass River	105,784,205.18	219,300.00

SAVINGS BANKS[1]

1970

	Total Assets	Minimum Required Additions To Guaranty Fund
Abington	$ 30,623,756.71	$ 50,000.00
South Adams	20,033,000.39	43,401.24
Provident Institution for Savings in the Towns of Salisbury and Amesbury	14,181,480.53	30,226.00
Amherst	63,227,784.73	134,791.69
The Andover	64,966,076.23	146,109.10
Arlington Five Cents	99,593,199.41	235,851.77
Athol	28,411,847.22	62,000.00
North Middlesex	23,779,719.52	63,500.00
Barre	8,275,869.29	17,728.58
Belmont	33,519,312.28	75,300.00
Beverly	81,110,395.78	176,000.00
The Boston Five Cents	655,863,264.08	1,441,150.00
Brighton Five Cents	48,522,496.45	103,900.00
Charlestown	501,153,635.85	1,067,575.00
Dorchester	226,247,192.05	475,700.00
East Boston	82,157,588.90	183,600.00
Eliot	67,890,198.69	153,405.00
Grove Hall	40,039,261.19	-0-
The Hibernia	14,807,157.13	32,322.44
Home Savings Bank	322,569,142.35	725,300.00
The Hyde Park	45,637,327.01	96,200.00
Lincoln	6,466,836.91	6,718.00
The Provident Institution for Savings in the Town of Boston	734,899,414.08	1,529,500.00

	Total Assets	Minimum Required Additions To Guaranty Fund
South Boston	$ 204,053,958.50	$ 461,000.00
Suffolk Franklin	425,035,787.61	317,685.00
Union Warren	244,148,315.61	545,891.51
The Braintree	29,808,779.55	65,500.00
Bridgewater	20,138,667.25	32,600.00
Brockton	79,730,917.06	171,600.00
People's Savings Bank of Brockton	36,410,774.57	80,700.00
Brookline	93,146,101.07	201,000.00
Cambridge	169,430,269.32	-0-
Cambridgeport	169,839,356.42	365,000.00
East Cambridge	73,082,921.50	155,753.00
North Avenue	61,676,608.10	89,700.00
The Canton Institution for Savings	12,973,330.65	26,903.00
Chelsea-County	110,929,498.08	50,000.00
Chicopee	42,525,448.73	111,736.50
Clinton	23,897,097.69	53,763.83
Cohasset	13,667,593.58	30,300.00
The Middlesex Institution for Savings	46,541,509.84	101,000.00
Conway	8,527,720.80	19,200.00
Danvers	49,861,573.68	100,400.00
Dedham Institution for Savings	82,102,792.60	179,800.00
East Bridgewater	16,925,660.27	36,900.00
Easthampton	53,795,771.59	118,400.00
North Easton	15,406,163.09	57,000.00
Dukes County	9,125,837.78	20,373.21

	Total Assets	Minimum Required Additions To Guaranty Fund
Everett	$ 40,312,333.74	$ 85,600.00
Fairhaven Institution for Savings	81,006,695.62	182,000.00
The Citizens'	69,160,627.97	148,146.61
Fall River	54,800,959.41	120,304.32
Fall River Five Cents	49,110,004.83	105,000.00
Union	33,802,269.23	-0-
Fitchburg	66,675,189.41	146,600.00
The Worcester North Savings Institution	67,148,021.53	-0-
Foxborough	12,924,494.97	27,635.00
Framingham	78,027,941.15	175,750.00
Benjamin Franklin	17,837,111.40	38,109.31
The Gardner	48,164,911.75	112,600.00
Georgetown	9,338,647.82	20,791.00
Cape Ann	41,706,112.10	89,200.00
Great Barrington	41,802,770.84	92,300.00
The Franklin Savings Institution	50,304,939.28	60,000.00
Greenfield	4,402,595.03	87,700.00
Cape Cod	60,860,123.35	146,000.00
Haverhill	106,162,167.43	226,307.46
Pentucket Five Cents	35,068,931.99	75,435.19
The Hingham Institution for Savings	25,723,625.44	54,750.00
Community	114,571,028.64	299,438.24
Holyoke	101,254,087.17	216,563.29
Peoples	86,004,561.29	186,000.00
Holliston-Hopkinton	9,483,563.77	20,965.51

	Total Assets	Minimum Required Additions To Guaranty Fund
Hudson	$ 27,131,837.15	$ 58,700.00
Ipswich	21,472,131.03	46,600.00
Community	25,170,669.86	60,000.00
Essex Broadway	141,114,184.93	106,500.00
Lawrence	94,958,987.76	207,002.00
Lee	30,775,547.42	66,000.00
Leicester	7,872,296.18	-0-
Lenox	13,677,749.54	40,130.50
Leominster	39,403,887.74	87,700.00
Lexington	41,303,188.48	89,348.95
The Central	89,673,861.77	200,000.00
The Lowell Five Cents	84,314,759.66	188,250.00
Lowell Institution for Savings	52,848,712.22	115,160.39
Washington	21,517,592.72	48,500.00
Ludlow	57,935,180.97	129,400.00
Lynn Five Cents	119,913,791.39	259,500.00
Lynn Institution for Savings	151,301,955.89	324,412.98
Malden	121,480,180.68	130,000.00
Marblehead	29,388,669.04	64,500.00
Marlborough	37,540,232.86	82,932.76
Assabet Institution for Savings	25,449,731.09	56,000.00
Medford	69,286,521.18	149,400.00
Medway	9,318,604.42	19,400.00
Melrose	67,634,239.64	150,487.33
Merrimac	3,521,514.34	3,800.00
Middleborough	9,606,722.16	22,200.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Milford	$ 40,119,770.40	$ 86,900.00
Millbury	13,232,606.80	34,314.61
Milton	71,905,900.29	158,000.00
Monson	13,654,204.91	-0-
Nantucket Institution for Savings	16,910,640.24	35,942.81
Natick Five Cents	55,447,550.19	121,200.00
New Bedford Five Cents	126,225,527.82	296,100.00
New Bedford Institution for Savings	186,846,231.67	446,254.66
Institution for Savings, in Newburyport and its Vicinity	37,293,646.62	119,092.30
Newburyport Five Cents	28,716,954.50	61,100.00
Newton	243,042,468.68	535,108.00
West Newton	60,075,137.56	134,000.00
North Adams Hoosac	53,945,902.53	115,600.00
Florence	25,744,902.53	56,700.00
Nonotuck	26,248,587.25	72,050.00
Northampton Institution for Savings	48,224,039.84	52,000.00
Attleborough	74,946,748.37	158,000.00
Whitinsville	25,603,028.95	54,735.00
North Brookfield	9,550,345.54	20,447.08
South Scituate	10,511,897.99	12,250.00
Orange	9,158,620.61	19,924.21
Palmer	37,137,324.99	125,000.00
Warren Five Cents	69,002,690.63	148,800.00
Berkshire County	87,717,508.83	184,425.00

	Total Assets	Minimum Required Additions To Guaranty Fund
City Savings Bank of Pittsfield	$ 85,031,437.57	$ 183,365.70
Plymouth	20,694,686.88	46,776.84
Plymouth Five Cents	40,290,383.66	85,900.00
Seamen's	16,665,009.03	34,828.73
Quincy	116,262,836.14	247,873.37
Randolph	32,255,837.58	70,526.97
Reading	24,537,820.69	53,500.00
Rockland	21,983,700.55	48,610.00
Granite	8,121,586.27	17,433.00
Salem	106,747,409.39	58,500.00
Salem Five Cents	176,711,893.54	385,651.81
Shelburne Falls	9,960,138.54	23,125.00
Somerset	20,517,024.59	44,142.92
Somerville	36,449,301.74	-0-
Southbridge	36,527,652.98	81,800.00
Spencer	16,013,651.43	35,100.00
Hampden	51,715,763.87	116,500.00
Springfield Five Cents	113,176,403.33	248,500.00
Springfield Institution for Savings	343,796,330.02	723,500.00
Stoneham	32,257,153.25	70,200.00
Bristol County	46,845,579.68	100,500.00
Taunton	31,149,802.18	68,923.10
Uxbridge	20,743,495.20	-0-
Wakefield	49,625,967.53	110,000.00
Waltham	80,582,021.20	194,000.00
Ware	77,753,905.33	165,100.00
Wareham	66,771,766.18	154,700.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Warren	$ 7,778,260.81	$ 4,900.00
Watertown	56,333,253.49	122,500.00
Webster Five Cents	40,453,224.55	87,450.00
Wellfleet	9,204,488.41	20,400.00
Westborough	23,049,915.08	49,800.00
Westfield	63,558,816.64	138,375.00
Woronoco	47,665,501.61	102,700.00
East Weymouth	16,294,777.27	35,849.47
South Weymouth	41,079,425.26	89,774.00
Weymouth	35,128,059.95	77,967.76
Whitman	27,378,665.78	55,000.00
Haydenville	5,233,404.62	-0-
Williamstown	23,931,841.53	56,992.73
Winchendon	19,027,590.10	-0-
Winchester	43,138,071.11	92,300.00
Winthrop	24,844,843.63	53,377.57
Woburn Five Cents	40,774,190.64	20,200.00
Bay State	48,297,278.48	123,355.24
People's Savings Bank, in the City of Worcester	146,898,946.19	184,000.00
Worcester County Institution for Savings	271,846,693.32	569,923.38
Worcester Five Cents	192,252,144.18	264,000.00
Worcester Mechanics	107,146,818.00	248,000.00
Bass River	119,343,467.76	274,900.00

SAVINGS BANK[1]

1971

	Total Assets	Minimum Required Additions To Guaranty Fund
Abington	$ 32,904,016.72	$ 71,000.00
South Adams	22,340,532.14	51,695.14
Provident Institution for Savings in the Towns of Salisbury and Amesbury	5,981,946.37	33,046.00
Amherst	73,504,839.00	153,105.13
The Andover	77,068,445.93	161,140.22
Arlington Five Cents	116,454,028.79	251,932.66
Athol	30,030,919.12	67,000.00
North Middlesex	26,873,985.52	62,000.00
Barre	8,859,407.13	19,068.41
Belmont	39,102,534.35	86,500.00
Beverly	89,794,616.70	195,500.00
The Boston Five Cents	745,774,321.75	1,575,341.00
Brighton Five Cents	53,375,039.10	-0-
Charlestown	547,308,476.25	1,152,782.00
Dorchester	249,087,666.18	517,400.00
East Boston	89,116,109.18	195,300.00
Eliot	68,036,658.78	150,575.00
Grove Hall	42,585,504.93	-0-
The Hibernia	19,772,215.21	40,604.42
Home	356,213.81	755,900.00
Hyde Park	50,084,192.35	106,200.00
Lincoln	6,677,329.66	6,750.00
The Provident Institution for Savings in the Town of Boston	836,096,920.11	1,748,300.00

	Total Assets	Minimum Required Additions To Guaranty Fund
South Boston	$ 239,439,185.54	$ 521,000.00
Suffolk Franklin	499,480,612.73	1,062,871.00
UnionWarren	279,967,643.65	588,817.13
The Braintree	37,801,751.77	82,900.00
Bridgewater	22,453,145.99	47,700.00
Brockton	91,693,702.17	193,400.00
People's Savings Bank of Brockton	40,315,318.50	101,000.00
Brookline	12,938,138.64	235,100.00
Cambridge	258,763,241.96	371,532.47
Cambridgeport	180,027,847.76	400,400.00
East Cambridge	80,152,930.73	172,594.00
The Canton Institution for Savings	16,306,730.24	32,235.00
Chelsea-County	132,118,106.19	276,000.00
Chicopee	47,826,130.64	98,329.12
Clinton	26,628,229.37	59,092.23
Cohasset	15,968,303.62	37,100.00
The Middlesex Institution for Savings	56,369,829.55	117,000.00
Conway	9,204,694.56	20,200.00
Danvers	57,161,120.28	117,290.00
Dedham Institution for Savings	92,253,580.19	194,400.00
East Bridgewater	18,946,803.82	40,500.00
Easthampton	59,194,409.78	129,000.00
North Easton	17,879,812.79	28,800.00
Dukes County	11,436,024.54	23,944.20
Everett	47,225,522.80	99,800.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Fairhaven	$ 92,495,615.11	$ 206,000.00
The Citizens'	75,807,002.83	186,572.53
Fall River	60,650,667.55	130,289.45
Fall River Five Cents	56,308,971.51	116,850.00
Union	37,126,847.69	60,500.00
Fitchburg	73,709,817.37	160,200.00
The Worcester North Savings Institution	73,417,848.50	142,500.00
Foxborough	15,766,104.11	33,337.00
Framingham	96,675,590.20	208,500.00
Benjamin Franklin	20,883,689.36	42,502.37
The Gardner	53,503,485.92	113,500.00
Georgetown	10,106,376.37	21,986.00
Cape Ann	47,319,644.27	100,925.00
Great Barrington	46,536,624.26	99,100.00
The Franklin Savings Institution	56,552,195.73	110,000.00
Greenfield	45,072,160.71	96,200.00
Cape Cod Five Cents	74,861,739.81	168,000.00
The Family Mutual	117,689,550.79	248,192.54
Pentucket	38,470,826.34	81,634.45
The Hingham Institution for Savings	30,086,535.24	68,750.00
Community	131,856,592.39	272,843.70
Holyoke	109,342,091.16	230,010.81
Peoples	94,534,836.31	201,500.00
Holliston-Hopkinton	10,418,376.68	22,786.62
Hudson	29,722,977.57	65,500.00
Ipswich	23,982,182.35	51,300.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Community	$ 27,365,555.97	$ 44,000.00
Essex Broadway	154,8[illegible]2,391.97	330,000.00
Lawrence	106,306,696.70	224,786.00
Lee	33,141,362.57	99,900.00
Leicester	8,275,548.53	4,700.00
Lenox	15,262,140.59	32,667.32
Leominster	43,504,184.70	93,300.00
Lexington	47,735,410.80	100,576.80
The Central	95,363,885.16	209,000.00
The Lowell Five Cent	93,991,034.46	202,030.75
Lowell Institution for Savings	58,265,857.63	128,914.13
Washington	22,958,434.18	50,000.00
Ludlow	65,170,022.48	133,200.00
Lynn Five Cents	134,450,008.37	280,500.00
Lynn Institution for Savings	171,086,987.97	353,763.43
Malden	134,990,818.95	206,200.00
Marblehead	34,283,307.90	72,500.00
Marlborough	42,699,800.21	92,483.81
Assabet Institution for Savings	28,451,386.83	63,000.00
Medford	79,572,315.68	171,500.00
Medway	10,879,644.50	22,200.00
Melrose	75,806,631.89	163,506.06
Merrimac	3,901,711.55	8,108.00
Middleborough	10,643,755.95	6,100.00
Milford	43,465,891.71	94,600.00
Millbury	14,511,437.02	30,413.95

	Total Assets	Minimum Required Additions To Guaranty Fund
Milton	$ 82,360,433.27	$ 185,000.00
Monson	14,658,880.90	-0-
Nantucket Institution for Savings	18,975,420.14	41,685.25
Natick	62,358,801.77	133,400.00
New Bedford Five Cents	141,101,443.92	301,000.00
New Bedford Institution for Savings	209,970,669.14	454,126.06
Institution for Savings, in Newburyport and its Vicinity	41,593,528.37	90,564.04
Newburyport Five Cents	33,293,539.78	68,800.00
Newton	296,086,266.45	632,711.00
West Newton	72,016,937.63	154,000.00
North Adams Hoosac	60,105,381.94	138,000.00
Florence	28,008,628.59	60,200.00
Nonotuck	28,978,025.39	63,050.00
Northampton Institution for Savings	54,163,424.19	113,800.00
N. Attleborough	82,703,475.06	174,500.00
Whitinsville	28,725,878.08	61,083.00
North Brookfield	10,715,324.37	22,729.17
South Scituate	11,502,719.78	-0-
Orange	10,413,763.73	22,183.75
Palmer	40,320,567.46	160,000.00
Warren Five Cents	77,798,382.81	163,300.00
Berkshire County	96,971,415.55	203,700.00
City Savings Bank of Pittsfield	95,845,356.06	200,720.70

	Total Assets	Minimum Required Additions To Guaranty Fund
Plymouth	$ 24,779,999.38	$ 51,701.52
Plymouth Five Cents	50,051,205.78	101,800.00
Seamen's	17,852,274.01	37,375.49
Quincy	136,793,320.28	282,369.88
Randolph	40,411,259.92	84,795.62
Reading	29,605,662.46	62,000.00
Rockland	25,225,890.63	53,932.00
Granite	10,222,204.88	20,526.00
Salem	117,492,983.58	247,500.00
Salem Five Cents	198,231,365.77	427,214.94
Shelburne Falls	10,664,190.77	23,540.00
Somerset	23,251,585.29	47,065.50
Somerville	40,350,977.26	-0-
Southbridge	40,363,002.47	88,200.00
Spencer	17,409,234.91	38,000.00
Hampden	48,263,101.78	129,500.00
Springfield Five Cents	125,982,388.93	282,500.00
Springfield Institution for Savings	383,365,000.41	799,900.00
Stoneham	37,225,843.80	79,150.00
Bristol County	54,145,676.19	113,800.00
Taunton	35,740,567.58	76,207.78
Uxbridge	22,094,626.45	-0-
Wakefield	58,199,301.38	122,000.00
Waltham	92,897,120.12	203,400.00
Ware	84,455,570.38	186,900.00
Wareham	79,123,980.50	166,500.00
Warren	8,686,262.60	9,250.00
Watertown	68,697,570.11	145,000.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Webster Five Cents	$ 44,227,455.48	$ 95,050.00
Wellfleet	10,795,193.00	23,500.00
Westborough	26,618,745.87	57,100.00
Westfield	72,049,472.17	155,000.00
Woronoco	52,154,649.45	112,150.00
East Weymouth	19,806,479.25	41,241.70
South Weymouth	46,810,052.15	98,656.00
Weymouth	39,946,270.95	85,717.42
Whitman	29,682,830.17	63,900.00
Haydenville	5,865,315.57	9,600.00
Williamstown	26,301,993.96	56,171.43
Winchendon	20,740,684.67	-0-
Winchester	50,679,230.87	108,300.00
Winthrop	29,096,212.55	61,845.51
Woburn Five Cents	47,056,931.01	73,500.00
Bay State	53,572,514.94	116,115.57
Consumers	210,498,235.27	429,600.00
People's Mechanics	271,256,047.14	584,300.00
Worcester County Institution for Savings	295,991,477.07	620,644.52
Bass River	144,745,738.35	304,100.00

SAVINGS BANKS[1]

1972

	Total Assets	Minimum Required Additions To Guaranty Fund
Abington	$ 36,297,085.93	$ 84,800.00
South Adams	25,478,780.55	54,356.78
Provident Institution for Savings in the Towns of Salisbury and Amesbury	17,413,251.65	36,486.00
Amherst	83,964,328.86	178,390.74
The Andover	88,235,732.86	187,317.30
Arlington Five Cents	130,235,849.81	287,718.38
Athol	31,235,194.28	70,500.00
North Middlesex	31,391,478.74	66,310.00
Barre	9,391,626.88	20,149.00
Belmont	45,262,518.78	100,800.00
Beverly	97,765,461.37	214,200.00
The Boston Five Cents	852,936,804.62	1,758,800.00
Charlestown	652,286,298.80	1,266,761.00
Dorchester	261,788,348.89	548,680.00
East Boston	95,337,188.22	209,009.00
Eliot	68,113,008.75	150,300.00
Grove Hall	47,818,569.31	26,000.00
The Hibernia	23,816,174.00	51,058.89
Home	390,119,713.47	827,300.00
The Hyde Park	54,933,355.71	116,550.00
Lincoln	6,869,091.57	14,507.84
The Provident Institution for Savings in the Town of Boston	888,250,779.71	1,920,600.00

	Total Assets	Minimum Required Additions To Guaranty Fund
South Boston	$ 262,009.32	$ 580,000.00
Suffolk Franklin	551,203,797.45	1,192,573.00
Union Warren	313,087,562.92	670,598.04
The Braintree	46,921,288.75	87,400.00
Bridgewater	24,107,919.97	52,300.00
Brockton	100,828,920.63	217,600.00
People's Savings Bank of Brockton	43,457,948.67	110,150.00
Brookline	134,422,973.57	285,100.00
Cambridge	285,563,161.69	604,708.34
Cambridgeport	189,869,767.33	421,700.00
East Cambridge	86,781,533.76	187,693.00
The Canton Institution for Savings	19,552,502.41	40,184.00
Atlantic	148,041,860.80	316,000.00
Chicopee	51,970,503.13	108,397.14
Clinton	29,168,670.13	65,184.10
Cohasset	17,885,684.50	38,200.00
The Middlesex Institution for Savings	63,445,470.57	133,500.00
Conway	10,191,419.97	22,100.00
Danvers	62,943,023.24	130,900.00
Dedham Institution for Savings	100,201,155.75	215,000.00
East Bridgewater	20,474,682.28	44,900.00
Easthampton	62,805,346.13	138,600.00
North Easton	29,917,794.84	44,600.00
Dukes County	14,425,654.38	30,404.42
Everett	53,920,473.38	113,700.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Fairhaven	$ 101,456,830.87	$ 223,000.00
The Citizens'	83,481,497.63	177,161.76
Fall River	66,538,687.16	143,913.45
Fall River Five Cents	64,658,985.45	132,900.00
Union	41,017,312.66	112,800.00
Fitchburg	79,750,700.59	173,500.00
The Worcester North Savings Institution	82,243,468.45	170,000.00
Foxborough	18,845,673.83	39,707.00
Framingham	114,149,454.25	245,310.00
Benjamin Franklin	22,872,200.83	52,232.91
The Gardner	58,760,896.81	124,000.00
Georgetown	11,145,689.37	25,500.00
Cape Ann	53,488,799.53	115,350.00
Great Barrington	53,087,844.50	112,800.00
The Franklin Savings Institution	61,183,317.49	160,000.00
Greenfield	51,821,024.16	108,100.00
Cape Cod Five Cents	88,749,688.14	198,000.00
The Family Mutual	125,589,042.62	269,000.00
Pentucket Five Cents	40,482,660.71	88,897.35
The Hingham Institution for Savings	34,369,614.96	85,000.00
Community	278,647,948.43	596,738.80
Holyoke	117,782,240.86	247,697.22
Peoples	101,598,670.06	215,500.00
Holliston-Hopkinton	11,420,161.61	25,371.36
Hudson	32,697,956.64	74,500.00
Ipswich	25,683,509.72	56,800.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Community	$ 28,691,490.11	$ 93,000.00
Essex Broadway	167,492,936.21	361,000.00
Lawrence	116,029,256.62	247,282.00
Lee	37,395,541.04	78,400.00
Leicester	8,637,771.26	19,450.00
Lenox	17,565,365.16	37,036.45
Leominster	47,005,511.27	102,100.00
Lexington	53,306,527.21	114,252.70
The Central	101.228,345.31	234,000.00
The Lowell Five Cent	100,003,205.44	217,637.01
Lowell Institution for Savings	64,001,245.65	142,117.48
Washington	24,623,218.32	54,000.00
Ludlow	72,360,540.83	149,575.00
Lynn Five Cents	144,993,190.96	332,750.00
Lynn Institution for Savings	181,966,900.95	384,529.48
Malden	151,099,893.42	310,950.00
Marblehead	38,185,882.06	82,750.00
Marlborough	48,841,852.37	104,447.73
Assabet Institution for Savings	31,182,225.29	69,800.00
Medford	89,253,864.06	193,500.00
Medway	12,328,857.31	26,000.00
Melrose	81,169,116.24	177,603.19
Merrimac	4,252,650.82	8,965.01
Middleborough	11,791,478.88	25,900.00
Milford	48,419,710.16	103,600.00
Millbury	15,691,677.48	10,710.69

	Total Assets	Minimum Required Additions To Guaranty Fund
Milton	$ 91,838,840.08	$ 206,000.00
Monson	15,798,243.38	16,960.25
Nantucket Institution for Savings	22,259,041.00	45,859.54
Natick Five Cents	69,149,198.00	148,500.00
New Bedford Five Cents	154,688,337.82	334,700.00
New Bedford Institution for Savings	231,222,745.48	499,000.51
Institution for Savings, in Newburyport and its Vicinity	47,178,233.25	98,562.74
Newburyport Five Cents	37,200,519.95	78,200.00
Newton	340,439,986.94	737,387.00
West Newton	83,116,121.02	181,000.00
North Adams Hoosac	66,316,465.07	140,800.00
Florence	30,290,137.05	65,700.00
Nonotuck	31,404,426.49	68,300.00
Northampton Institution for Savings	64,295,617.92	132,400.00
Attleborough	92,511,474.89	195,500.00
Whitinsville	32,026,873.46	67,729.00
North Brookfield	12,163,356.78	25,515.42
South Scituate	13,257,706.35	27,750.00
Orange	12,034,981.67	25,510.02
Palmer	44,275,225.38	-0-
Warren Five Cents	86,619,002.85	184,700.00
Berkshire County	106,909,612.90	225,850.00
City Savings Bank of Pittsfield	104,667,009.42	223,623.89

	Total Assets	Minimum Required Additions To Guaranty Fund
Plymouth	$ 29,199,874.59	$ 61,253.86
Plymouth Five Cents	60,508,347.85	125,100.00
Seamen's	20,263,884.49	41,424.27
Quincy	158,444,697.26	325,892.06
Randolph	47,871,288.62	102,800.00
Reading	36,550,067.45	77,500.00
Rockland	27,976,556.21	60,574.00
Granite	12,071,779.89	25,791.00
Salem	126,727,971.50	267,500.00
Salem Five Cents	218,381,821.51	472,643.25
Shelburne Falls	12,072,855.12	26,365.00
Somerset	25,195,089.66	49,663.40
Somerville	45,233,170.67	80,350.00
Southbridge	44,674,320.50	97,400.00
Spencer	19,041,894.17	40,600.00
Hampden	62,437,307.30	144,000.00
Springfield Institution for Savings	435,053,334.83	886,109.22
Stoneham	40,843,603.52	88,200.00
Bristol County	59,707,887.04	127,800.00
Taunton	38,493,189.16	84,525.59
Uxbridge	23,922,019.65	-0-
Wakefield	63,307,370.29	137,000.00
Waltham	102,953,108.78	229,400.00
Ware	90,837,333.20	186,500.00
Wareham	92,699,548.23	192,700.00
Warren	9,752,236.02	21,660.71
Watertown	80,666,499.48	177,000.00
Webster Five Cents	47,870,376.28	103,300.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Wellfleet	$ 11,821,116.72	$ 26,700.00
Westborough	30,554,829.93	65,900.00
Westfield	82,665,858.91	176,600.00
Woronoco	58,603,502.84	125,600.00
East Weymouth	22,360,557.04	48,400.00
South Weymouth	53,176,166.45	111,100.00
Weymouth	44,498,154.71	97,244.33
Whitman	31,820,903.57	68,950.00
Haydenville	6,544,628.53	14,400.00
Williamstown	29,254,462.21	62,800.08
Winchendon	21,967,188.43	-0-
Winchester	57,768,411.23	124,700.00
Winthrop	31,967,881.86	71,300.57
Woburn Five Cents	54,821,733.80	112,500.00
Bay State	59,094,247.82	127,740.14
Consumers	229,748,868.82	469,800.00
People's Mechanics	285,555,613.05	622,000.00
Worcester County Institution for Savings	320,266,981.84	674,499.02
Bass River	175,676,751.02	366,500.00

SAVINGS BANKS[1]

1973

	Total Assets	Minimum Required Additions To Guaranty Fund
Abington	$ 38,964,349.58	$ 84,825.00
South Adams	28,663,631.66	61,695.93
Provident Institution for Savings in the Towns of Salisbury and Amesbury	18,795,120.49	39,556.00
Amherst	91,364,809.80	217,601 47
The Andover	96,882,741.89	215,044.45
Arlington Five Cents	141,203,280.23	318,869.31
Athol	33,067,202.29	74,500.00
North Middlesex	33,831,157.26	74,900.00
Barre	9,830,851.44	21,388.98
Belmont	51,471,391.68	113,600.00
Beverly	105,253,229.37	231,700.00
The Boston Five Cents	876,417,610.76	1,900,025.00
Charlestown	676,304,544.91	1,503,378.00
Dorchester	266,412,704.32	571,520.00
East Boston	98,801,864.93	220,191.00
Eliot	61,355,407.10	71,570.00
Grove Hall	45,280,065.92	53,500.00
The Hibernia	24,747,121.32	56,753.47
Home	380,496,422.19	868,000.00
The Hyde Park	60,787,572.38	128,850.00
Lincoln	7,374,992.93	11,200.00
The Provident Institution for Savings in the Town of Boston	883,265,896.48	2,047,700.00

	Total Assets	Minimum Required Additions To Guaranty Fund
South Boston	$ 264,167,836.83	$ 629,000.00
Suffolk Franklin	546,205,250.88	1,269,457.00
Union Warren	312,238,964.24	727,406.00
The Braintree	52,088,013.53	111,000.00
Bridgewater	26,267,913.97	57,200.00
Brockton	107,783,414.82	237,700.00
People's Savings Bank of Brockton	45,150,472.47	132,775.00
Brookline	139,885,109.74	333,000.00
Cambridge	302,166,361.39	653,374.97
Cambridgeport	189,204,063.90	435,200.00
East Cambridge	89,014,667.75	199,924.00
The Canton Institution for Savings	23,325,147.37	48,210.00
Atlantic	152,780,454.78	344,000.00
Chicopee	53,640,817.66	127,079.10
Clinton	31,442,624.46	70,824.60
Cohasset	19,513,780.46	41,900.00
The Middlesex Institution for Savings	66,718,073.01	149,000.00
Conway	11,228,065.75	24,300.00
Danvers	68,965,571.58	147,860.00
Dedham Institution for Savings	105,839,446.22	236,000.00
East Bridgewater	22,816,816.28	53,400.00
Easthampton	68,440,372.27	147,300.00
North Easton	23,670,813.98	51,800.00
Dukes County	16,963,717.15	35,915.14
Everett	58,903,523.76	129,700.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Fairhaven	$ 102,664,136.72	$ 238,500.00
The Citizens	87,266,319.70	190,163.47
Fall River	72,961,654.72	156,697.73
Fall River Five Cents	68,334,014.49	148,100.00
Union	42,375,256.20	97,900.00
Fitchburg	85,198,984.82	189,200.00
The Worcester North Savings Institution	89,179,984.82	188,200.00
Foxborough	21,637,939.87	47,275.00
Framingham	124,432,354.89	307,000.00
Benjamin Franklin	26,815,721.37	56,388.14
The Gardner	65,156,956.62	135,700.00
Georgetown	11,992,727.77	26,900.00
Cape Ann	58,969,983.26	128,975.00
Great Barrington	50,739,873.05	129,700.00
The Franklin Savings Institution	67,766,034.65	160,000.00
Greenfield	55,466,364.80	122,300.00
Cape Cod Five Cents	113,717,614.90	251,200.00
The Family Mutual	131,930,652.66	291,300.00
Pentucket Five Cents	42,627,824.83	94,884.61
The Hingham Institution for Savings	39,009,915.34	86,600.00
Community	297,467,161.51	639,325.63
Holyoke	123,724,223.58	286,598.65
Peoples	109,600,667.30	234,500.00
Holliston-Hopkinton	12,766,518.28	28,000.00
Hudson	33,734,589.61	83,000.00
Ipswich	27,411,913.87	62,000.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Community	$ 30,752,250.02	$ 106,000.00
Essex Broadway	174,052,872.56	387,000.00
Lawrence	123,935,430.83	269,312.00
Lee	41,490,153.67	88,900.00
Leicester	8,847,972.20	20,500.00
Lenox	19,295,832.70	42,028.17
Leominster	50,587,543.04	111,700.00
Lexington	58,115,038.22	128,856.51
The Central	111,172,553.65	240,800.00
The Lowell Five Cent	112,926,268.93	238,834.28
Lowell Institution for Savings	67,803,438.33	152,133.85
Washington	25,088,390.35	57,000.00
Ludlow	80,305,402.14	166,475.00
Lynn Five Cents	156,929,484.29	334,800.00
Lynn Institution for Savings	192,624,487.40	413,005.97
Malden	159,816,016.87	344,650.00
Marblehead	41,644,526.20	93,000.00
Marlborough	52,249,862.42	114,282.81
Assabet Institution for Savings	34,424,476.81	83,100.00
Medford	97,220,548.50	215,000.00
Medway	14,296,981.89	30,400.00
Melrose	87,476,334.99	190,414.04
Merrimac	4,993,209.09	10,396.44
Middleborough	12,416,987.65	28,500.00
Milford	52,739,650.80	114,800.00
Millbury	16,801,322.20	33,900.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Milton	$ 97,379,954.93	$ 229,000.00
Monson	16,544,039.24	38,329.72
Nantucket	24,623,558.44	52,819.72
Natick Five Cents	75,701,519.98	165,900.00
New Bedford Five Cents	168,656,256.36	370,800.00
New Bedford Institution	244,616,666.16	539,971.22
Institution for Savings, in Newburyport and its Vicinity	51,489,183.97	110,809.89
Newburyport Five Cents	42,369,669.02	88,700.00
Newton	375,010,927.28	835,257.00
West Newton	88,057,917.68	204,000.00
North Adams Hoosac	72,856,609.76	156,000.00
Florence	32,085,146.51	70,800.00
Nonotuck	34,731,149.71	87,550.00
Northampton Institute for Savings	72,431,170.58	168,622.00
Attleborough	102,246,634.31	215,100.00
Whitinsville	34,650,566.78	74,504.00
North Brookfield	13,820,008.15	29,617.42
South Scituate	14,400,920.38	32,600.00
Orange	14,707,605.00	31,050.00
Palmer	49,216,232.81	109,000.00
Warren Five Cents	92,499,844.31	207,800.00
Berkshire County	116,023,874.55	245,200.00
City Savings Bank of Pittsfield	116,264,475.05	247,034.37
Plymouth Five Cents	71,220,900.83	149,800.00
Seamen's	21,153,779.06	45,050.76

	Total Assets	Minimum Required Additions To Guaranty Fund
Quincy	$ 173,479,126.75	$ 366,379.16
Randolph	55,454,444.64	136,200.00
Reading	40,525,680.16	91,500.00
Rockland	30,911,209.33	65,799.00
Granite	14,223,887.39	34,200.00
Salem	129,147,296.68	280,500.00
Salem Five Cents	226,677,390.66	506,665.56
Shelburne Falls	13,909,400.17	30,345.00
Somerset	27,090,125.90	58,300.00
Somerville	45,926,604.94	101,702.00
Southbridge	46,318,725.69	105,500.00
Spencer	20,307,655.58	45,331.00
Hampden	66,046,254.23	153,000.00
Springfield Institution for Savings	467,802,262.63	985,766.36
Stoneham	43,751,529.36	96,450.00
Bristol County	64,945,586.35	142,100.00
Taunton	43,526,754.90	94,975.00
Uxbridge	26,925,983.48	71,125.00
Wakefield	70,748,965.45	153,000.00
Waltham	110,804,769.69	257,000.00
Ware	97,751,062.18	199,700.00
Plymouth	127,653,115.59	324,126.73
Warren	10,714,518.46	22,624.94
Watertown	89,696,962.74	216,000.00
Webster Five Cents	50,517,637.73	110,435.00
Westborough	33,912,479.38	73,700.00
Westfield	87,160,340.83	194,425.00
Woronoco	64,466,040.92	139,800.00

	Total Assets	Minimum Required Additions To Guaranty Fund
East Weymouth	$ 25,534,621.62	$ 54,800.00
South Weymouth	57,415,371.60	123,200.00
Weymouth	47,824,866.48	115,993.22
Whitman	33,358,900.62	74,800.00
Haydenville	7,233,705.99	15,800.00
Williamstown	32,107,469.50	71,100.00
Winchendon	23,194,765.48	29,300.00
Winchester	62,252,693.73	139,400.00
Winthrop	33,821,960.82	77,342.00
Woburn Five Cents	61,690,518.60	129,100.00
Bay State	59,225,807.96	134,817.31
Consumers	245,114,022.80	510,600.00
People's	295,065,340.36	654,900.00
Worcester County Institution for Savings	341,047,842.86	728,582.49
Bass River	209,134,660.62	435,400.00

SAVINGS BANK[1]

1974

	Total Assets	Minimum Required Additions To Guaranty Fund
Abington	$ 40,364,978.37	$ 89,500.00
South Adams	30,702,634.90	68,987.06
Provident Institution for Savings in the Towns of Salisbury and Amesbury	19,778,483.25	41,475.00
Amherst	94,612,698.04	229,769.59
The Andover	102,537,509.96	228,758.96
Arlington Five Cents	145,974,118.19	333,068.28
Athol	33,384,818.75	79,000.00
North Middlesex	35,589,380.89	79,000.00
Barre	10,181,762.05	21,696.00
Belmont	54,276,364.31	122,200.00
Beverly	107,724,482.24	241,500.00
The Boston Five Cents	832,814,579.58	1,871,261.00
Charlestown	672,006,872.39	1,528,692.00
Dorchester	257,027,058.98	574,200.00
East Boston	103,672,116.19	229,400.00
Eliot	59,710,100.27	-0-
Grove Hall	41,328,473.79	-0-
The Hibernia	24,697,947.96	56,779.00
Home	348,816,391.66	821,400.00
The Hyde Park	63,511,118.60	138,300.00
Lincoln	7,107,633.23	15,200.00
The Provident Institution for Savings in the Town of Boston	840,450,701.84	1,973,700.00

	Total Assets	Minimum Required Additions To Guaranty Fund
South Boston	$ 267,201,285.33	$ 631,000.00
Suffolk Franklin	525,489,632.94	1,122,137.00
Union Warren	297,144,602.81	688,851.91
The Braintree	54,897,572.10	123,500.00
Bridgewater	26,763,347.33	59,800.00
Brockton	113,758,277.20	251,500.00
People's Savings Bank of Brockton	45,188,314.11	129,475.00
Brookline	144,270,346.15	328,600.00
Cambridge	300,418,816.73	667,337.74
Cambridgeport	186,108,618.86	422,500.00
East Cambridge	92,581,767.76	206,555.00
The Canton Institution for Savings	25,269,770.61	53,925.00
Chelsea	152,639,951.47	353,000.00
Chicopee	59,226,456.56	129,059.67
Clinton	34,343,724.66	75,868.86
Cohasset	18,939,022.33	42,400.00
The Middlesex Institution for Savings	66,922,550.37	154,000.00
Conway	11,911,891.76	26,500.00
Danvers	70,635,283.93	156,500.00
Dedham Institution for Savings	112,055,453.37	246,900.00
East Bridgewater	24,108,254.84	53,900.00
Easthampton	69,636,153.02	154,400.00
North Easton	24,728,515.01	55,300.00
Dukes County	18,010,691.16	40,775.44
Everett	64,559,579.77	141,200.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Fairhaven Institution for Savings	$ 103,955,895.96	$ 237,500.00
The Citizens'	88,478,590.89	59,745.97
Fall River	75,673,313.48	96,723.52
Fall River Five Cents	68,575,888.45	154,300.00
Union	43,858,461.13	99,700.00
Fitchburg	90,169,342.72	200,400.00
The Worcester North Savings Institution	91,067,257.05	198,700.00
Foxborough	22,563,610.12	46,196.00
Framingham	124,809,694.20	308,500.00
Benjamin Franklin	31,498,520.91	65,442.27
The Gardner	68,416,995.47	145,300.00
Georgetown	12,763,929.52	28,386.48
Cape Ann	61,261,517.47	137,000.00
Great Barrington	60,891,040.15	137,400.00
The Franklin Savings Institution	71,684,038.42	157,300.00
Greenfield	61,927,505.63	135,000.00
Cape Cod Five Cents	118,922,634.15	270,100.00
Haverhill (Family Mutual)	138,069,129.76	301,800.00
Pentucket	43,928,182.07	96,100.00
The Hingham Institution for Savings	43,274,077.28	96,200.00
Community (Holyoke)	305,219,277.33	673,716.81
Holyoke	126,509,934.23	275,756.14
Peoples	111,992,107.96	249,000.00
Holliston-Hopkinton	13,384,092.33	30,300.00
Hudson	35,636,474.60	84,000.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Ipswich	$ 28,813,645.80	$ 65,700.00
Community (Lawrence)	32,176,089.44	32,000.00
Essex Broadway	177,308,286.44	395,000.00
Lawrence Savings Bank	126,459,243.11	280,128.00
Lee Savings Bank	42,314,611.55	94,800.00
Leicester	9,100,287.33	5,200.00
Lenox	19,452,257.44	44,357.18
Leominster	51,456,029.32	116,000.00
Lexington	59,914,607.64	135,882.90
The Central	115,697,186.27	253,500.00
The Lowell Five Cent	112,907,949.55	252,853.50
Lowell Institution for Savings	69,516,870.60	155,147.55
Washington	26,327,388.89	57,500.00
Ludlow	83,151,464.59	179,985.00
Lynn Five Cents	158,172,712.28	344,200.00
Lynn Institution for Savings	193,946,821.07	424,097.33
Malden	166,298,007.85	366,150.00
Marblehead	42,761,508.96	96,508.11
Marlborough	52,770,628.40	121,366.59
Assabet Institution for Savings	36,611,690.41	83,000.00
Medford	103,895,178.35	232,400.00
Medway	15,458,651.18	34,000.00
Melrose	90,923,418.08	200,538.39
Merrimac	5,002,306.17	11,187.69
Middleborough	12,986,397.75	30,000.00
Milford	57,026,937.18	122,800.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Millbury	$ 17,397,396.13	$ 38,200.00
Milton	96,321,259.14	338,650.00
Monson	17,253,284.15	34,100.00
Nantucket Institution for Savings	26,749,672.41	56,957.88
Natick Five Cents	78,009,058.33	175,400.00
New Bedford Five Cents	173,378,560.47	386,500.00
New Bedford Institution for Savings	251,620,263.77	561,442.89
Institution for Savings, in Newburyport and its Vicinity	54,830,199.04	119,500.00
Newburyport Five Cents	44,144,959.55	95,700.00
(Newton) Mutual Bank for Savings	383,366,483.93	887,213.00
West Newton	89,616,449.54	208,000.00
North Adams Hoosac	74,456,187.93	164,200.00
Florence	32,957,073.97	75,700.00
Nonotuck	35,889,944.34	80,100.00
Northampton Institution for Savings	79,384,832.80	175,960.93
Attleborough	102,140,964.05	225,600.00
Whitinsville	35,844,405.03	77,885.00
North Brookfield	15,611,837.55	32,960.53
South Scituate	14,897,439.35	40,750.00
Orange	17,521,041.46	37,226.00
Warren Five Cents	96,326,328.46	218,200.00
Berkshire County	122,471,571.61	260,300.00
City Savings Bank of Pittsfield	112,718,276.16	254,000.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Palmer	$ 51,283,412.22	$ 118,700.00
Plymouth Five Cents	73,789,645.79	163,500.00
Seamen's	21,740,120.15	46,481.44
Quincy	177,150,590.42	390,129.60
Randolph	61,102,852.94	140,500.00
Reading	44,832,695.29	100,000.00
Rockland	31,397,550.56	69,509.08
Granite	15,222,499.10	39,000.00
Salem	131,900,681.30	236,200.00
Salem Five Cents	229,360,811.20	516,939.79
Shelburne Falls	15,640,323.96	34,330.00
Somerset	28,284,125.05	61,700.00
Somerville	48,191,931.82	105,800.00
Southbridge	48,057,291.53	108,800.00
Spencer	21,747,440.62	47,801.88
Hampden	64,574,232.99	150,500.00
Stoneham	45,254,528.16	101,200.00
Bristol County	67,738,118.11	151,000.00
Springfield Institution for Savings	481,684,638.35	1,036,205.34
Taunton	46,898,001.33	103,325.00
Uxbridge	28,480,266.78	62,300.00
Wakefield	72,831,891.78	162,000.00
Waltham	114,151,766.04	269,000.00
Ware	97,952,397.61	210,200.00
(Wareham) Plymouth Savings Bank	130,193,937.47	293,500.00
Warren	11,135,636.55	24,308.44
Watertown	101,264,465.92	224,500.00

	Total Assets	Minimum Required Additions To Guaranty Fund
Webster Five Cents	$ 53,089,625.42	$ 115,650.00
Westborough	34,802,447.65	77,800.00
Westfield	90,997,713.44	203,062.50
Woronoco	67,344,326.40	148,850.00
East Weymouth	27,253,787.86	61,068.30
South Weymouth	60,201,894.75	133,000.00
Weymouth	49,463,530.38	113,104.75
Whitman	32,847,350.98	74,700.00
Haydenville	7,654,043.98	17,400.00
Williamstown	33,993,253.48	75,700.00
Winchendon	23,543,103.32	50,000.00
Winchester	63,313,810.47	143,300.00
Winthrop	36,578,327.48	81,800.00
Woburn Five Cents	63,796,587.27	142,400.00
Bay State	56,837,821.93	131,500.00
Consumer Savings Bank (Worcester)	245,484,918.81	532,300.00
People's Savings Bank, in the City of Worcester	298,895,871.75	673,700.00
Worcester County Institution for Savings	346,253,945.31	757,981.94
Bass River	215,139,728.63	480,700.00

(C) FEDERAL SAVINGS AND LOAN ASSOCIATIONS

FEDERAL SAVINGS AND LOAN ASSOCIATIONS[2]

NAME: Bay Colony Federal Savings and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 1,089
1969	32,304
1970	42,616
1971	29,996
1972	64,895
1973	73,379
1974	83,574
	$327,853

NAME: Bay State Federal Savings and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ -0-
1969	-0-
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	-0-

NAME: Boston Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$318,320
1969	320,723
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$639,043

NAME: Colonial Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 28,116
1969	20,300
1970	-0-
1971	-0-
1972	231,888
1973	87,640
1974	-0-
	$367,944

NAME: Edward Everett Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 33,611.30
1969	36,608.25
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$70,219.55

NAME: Family Federal Savings
and Loan Association — Fitchburg

Year	Minimum Required Additions To Guaranty Fund
1968	$ -0-
1969	-0-
1970	2,125
1971	-0-
1972	1,203
1973	-0-
1974	-0-
	$3,328

NAME: First Federal Savings
and Loan Association — Attleboro

Year	Minimum Required Additions To Guaranty Fund
1968	$ 52,584
1969	58,269
1970	-0-
1971	47,897
1972	35,542
1973	92,805
1974	85,729
	$372,826

NAME: First Federal Savings
and Loan Association — Boston

Year	Minimum Required Additions To Guaranty Fund
1968	$221,666.16
1969	-0-
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$221,666.16

NAME: First Federal Savings
and Loan Association of Cape Cod

Year	Minimum Required Additions To Guaranty Fund
1968	$15,281
1969	9,779
1970	9,833
1971	16,796
1972	29,089
1973	15,817
1974	27,493
	$124,088

NAME: First Federal Savings
and Loan Association of Fall River

Year	Minimum Required Additions To Guaranty Fund
1968	$175,247
1969	156,250
1970	113,339
1971	77,338
1972	168,998
1973	118,588
1974	183,743
	$993,503

NAME: First Federal Savings
and Loan Association of Lowell

Year	Minimum Required Additions To Guaranty Fund
1968	$140,463
1969	160,929
1970	124,412
1971	315,395
1972	188,859
1973	615,603
1974	654,556
	$2,200,217

NAME: First Federal Savings
and Loan Association of Worcester

Year	Minimum Required Additions To Guaranty Fund
1968	$657,057.70
1969	670,246.00
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$1,327,303.70

NAME: Foxboro Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$21,365
1969	22,120
1970	7,000
1971	-0-
1972	-0-
1973	21,163
1974	51,492
	$123,140

NAME: Home Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$54,720.20
1969	-0-
1970	59,648.73
1971	-0-
1972	-0-
1973	-0-
1974	24,330.00
	$138,698.93

NAME: Home Owners Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$674,781
1969	332,810
1970	-0-
1971	-0-
1972	-0-
1973	152,253
1974	270,148
	$1,429.992

NAME: Leader Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 65,675.00
1969	77,465.92
1970	78,907.25
1971	291,862.21
1972	173,684.59
1973	441,378.00
1974	534,835.00
	$1,663,807.97

NAME: Metropolitan Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$44,706
1969	47,732
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$92,438

NAME: Middlesex Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$81,052.99
1969	93,499.21
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$174,552.20

NAME: Milford Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 46,465
1969	53,257
1970	60,121
1971	68,908
1972	-0-
1973	-0-
1974	-0-
	$228,751

NAME: Montello Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 62,066.47
1969	60,170.14
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$122,236.61

NAME: Monument Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$23,044
1969	28,235
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$53,279

NAME: Mutual Federal Savings
and Loan Association of Whitman

Year	Minimum Required Additions To Guaranty Fund
1968	$ -0-
1969	-0-
1970	-0-
1971	-0-
1972	-0-
1973	42,881
1974	63,342
	$106,223

NAME: Natick Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 89,059
1969	99,736
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$188,795

NAME: Northeast Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 282,952
1969	187,324
1970	-0-
1971	-0-
1972	266,557
1973	530,442
1974	5,231,900
	$6,499,175

NAME: Peoples Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 24,500
1969	28,338
1970	28,150
1971	32,560
1972	-0-
1973	-0-
1974	-0-
	$113,548

NAME: Plymouth Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 47,327
1969	51,055
1970	61,691
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$160,073

NAME: Revere Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 19,364
1969	21,330
1970	25,066
1971	26,845
1972	28,098
1973	28,879
1974	29,645
	$179,227

NAME: Scituate Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$ 15,574
1969	18,600
1970	22,153
1971	25,038
1972	67,229
1973	76,440
1974	58,564
	$283,598

NAME: Second Federal Savings
and Loan Association of Boston

Year	Minimum Required Additions To Guaranty Fund
1968	$ 88,657
1969	75,156
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$163,813

NAME: Security Federal Savings
and Loan Association of Brockton

Year	Minimum Required Additions To Guaranty Fund
1968	$ 84,012.84
1969	92,137.87
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$176,150.71

NAME: Union Federal Savings
and Loan Association of Boston

Year	Minimum Required Additions To Guaranty Fund
1968	$ 76,874
1969	87,616
1970	83,070
1971	4,824
1972	40,407
1973	128,882
1974	142,982
	$564,655

NAME: Union Federal Savings
and Loan Association of Pittsfield

Year	Minimum Required Additions To Guaranty Fund
1968	$299,522.00
1969	305,226.00
1970	-0-
1971	-0-
1972	13,965.00
1973	5,796.00
1974	71,534.00
	$696,043.00

NAME: Waltham Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$177,059.50
1969	221,612.67
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	(5,026.00)
	$393,646.17

NAME: Winter Hill Federal Savings
and Loan Association

Year	Minimum Required Additions To Guaranty Fund
1968	$15,278.95
1969	-0-
1970	-0-
1971	-0-
1972	-0-
1973	-0-
1974	-0-
	$15,278.95

(D) CUMULATIVE DATA

CUMULATIVE DATA

CO-OPERATIVE BANKS

Year	Total Assets	Minimum Required Additions To Guaranty Fund	Ratio
1968	$1,979,089,931.00	$ 5,786,430.00	.0029
1969	2,097,799,566.00	10,674,776.00	.0051
1970	2,179,978,408.00	6,156,241.00	.0028
1971	2,513,499,369.00	6,226,401.00	.0025
1972	2,693,775,097.00	6,747,920.00	.0025
1973	2,971,845,658.00	8,558,650.00	.0029
1974	3,044,791,661.00	8,540,420.00	.0028
1975	3,179,208,393.00	13,069,201.00	.0041

SAVINGS BANKS

Year	Total Assets	Minimum Required Additions To Guaranty Fund	Ratio
1968	$10,220,751,082.57	$19,224,552.80	.0019
1969	11,699,663,535.68	22,140,797.21	.0019
1970	12,483,982,339.50	24,754,421.97	.0020
1971	13,640,427,973.18	33,330,871.70	.0024
1972	15,398,100,942.42	33,024,558.43	.0021
1973	18,456,156,660.26	37,433,992.59	.0020
1974	17,250,426,224.42	37,850,736.73	.0022

FEDERAL SAVINGS AND LOAN ASSOCIATIONS

Year	Total Assets	Minimum Required Additions To Guaranty Fund	Ratio
1968	$1,727,091,875.35	$3,939,491.11	.0023
1969	1,753,609,623.09	3,368,829.06	.0019
1970	1,848,551,158.73	718,131.98	.0004
1971	2,101,390,919.01	937,459.21	.0004
1972	2,336,527,581.68	1,310,414.59	.0006
1973	2,477,195,150.83	2,431,946.00	.0010
1974	2,611,779,557.02	7,508,841.00	.0029

FOOTNOTES

[1] The sources of these figures are the reports filed annually as required by law with the Commissioner of Banks and Banking of the Commonwealth. These reports, kept on file in the Commissioner's office, are no longer available for 1966 and 1967.

[2] The total assets figures for the federal savings and loan associations were provided by the Federal Home Loan Bank of Boston. The minimum additions to federal insurance reserve figures were provided by the plaintiff federal savings and loan association from their books and records regularly kept in the ordinary course of business.

EXHIBIT 4

TO THE

STIPULATION OF FACTS

Massachusetts Federal Savings & Loan Associations Gross Income From All Sources Compared to Gross Income From Mortgage Loans Secured by Real Estate Located Outside the Commonwealth of Massachusetts *

Year	Total Gross Income	Total Non-Massachusetts Mortgage Loan Income
1966	$ 71,596,071.60	$26,778,026.07
1967	77,652,430.58	29,038,510.86
1968	87,331,991.38	31,532,420.29
1969	95,456,001.35	36,642,807.85
1970	102,601,071.57	38,956,452.61
1971	117,693,124.20	38,564,120.80
1972	137,626,727.49	44,561,169.35
1973	157,830,900.70	47,192,038.17
1974	170,077,613.75	49,081,785.15

* The sources of this information are the books and records regularly kept by the plaintiff federal associations in the ordinary course of business. This exhibit, however, does not contain any gross income or non-Massachusetts mortgage loan income figures from the Revere Federal Savings & Loan Association, Metropolitan Federal Savings & Loan Association and Foxboro Federal Savings & Loan Association because they cannot determine non-Massachusetts mortgage loan income from their records. With respect to non-Massachusetts mortgage loan income, the books and records of the following Massachusetts federal savings and loan associations only enabled them to provide a figure which is derived from calendar year figures in their books and records concerning the value of all outstanding mortgage loans, the value of all mortgage loans secured by out-of-state real estate, gross mortgage loan income and the lowest, median and/or highest rate of return (interest rate) on all mortgage loans: Northeast Federal Savings & Loan Association (now merged into Freedom Federal Savings & Loan Association), First Federal Savings and Loan Association, Home Owners Federal Savings & Loan Association, First Federal Savings & Loan Association of Fall River, First Federal Savings & Loan Association of Lowell, Winter Hill Federal Savings & Loan Association, and Union Federal Savings & Loan Association.

EXHIBIT 5
TO THE
STIPULATION OF FACTS

COMPARISON OF COMPOSITION OF ASSETS OF FEDERAL SAVINGS & LOAN ASSOCIATIONS LOCATED IN MASSACHUSETTS, MASSACHUSETTS CREDIT UNIONS, MASSACHUSETTS COOPERATIVE BANKS AND MASSACHUSETTS SAVINGS BANKS AS PERCENT OF TOTAL ASSETS

	Federal Savings & Loan Associations in Mass.[1] December 31, 1966	Mass. Credit Unions[2] June 30, 1966	Mass. Co-operative Banks[3] April 30, 1966	Mass. Savings Banks[4] October 31, 1966
I. Cash and Deposits in Other Banks	2.30	5.56	3.35	1.39
II. U. S. Government Obligations	5.48	4.22	7.43	17.22
III. Loans:				
(a) Real Estate Loans (including mortgage participation loans)	86.13	29.36	83.87	71.25
(b) Other Loans (including personal loans)	2.29	44.44	2.12	2.05
IV. Bank Premises (including leasehold improvements, furniture and fixtures)	.45	.73	.67	.59
V. Other Investments	2.14	15.69	.21	7.50
TOTAL[5]	98.89	100.00	100.00	100.00

	Federal Savings & Loan Associations in Mass.[1] December 31, 1967	Mass. Credit Unions[2] June 30, 1967	Mass. Co-operative Banks[3] April 30, 1967	Mass. Savings Banks[4] October 31, 1967
I. Cash and Deposits in Other Banks	1.914	4.74	4.36	1.36
II. U. S. Government Obligations	5.855	4.11	6.57	12.87
III. Loans:				
(a) Real Estate Loans (including mortgage participation loans)	86.07	29.70	83.85	70.68
(b) Other Loans (including personal loans)	2.21	44.42	2.20	2.29
IV. Bank Premises (including leasehold improvements, furniture and fixtures)	1.173	.85	.68	.61
V. Other Investments	3.40	20.11	.28	12.19
TOTAL[5]	100.61	100.00	100.00	100.00

	Federal Savings & Loan Associations in Mass.[1] December 31, 1968	Mass. Credit Unions[2] June 30, 1968	Mass. Co-operative Banks[3] April 30, 1968	Mass. Savings Banks[4] October 31, 1968
I. Cash and Deposits in Other Banks	1.18	6.64	4.32	1.21
II. U. S. Government Obligations	5.67	5.77	6.83	9.69
III. Loans:				
(a) Real Estate Loans (including mortgage participation loans)	87.04	30.03	82.08	70.79
(b) Other Loans (including personal loans)	2.17	44.87	2.06	2.53
IV. Bank Premises (including leasehold improvements, furniture and fixtures)	1.16	.82	.72	.64
V. Other Investments	1.49	11.87	3.99	15.14
TOTAL[5]	98.71	100.00	100.00	100.00

	Federal Savings & Loan Associations in Mass.[1] December 31, 1969	Mass. Credit Unions[2] June 30, 1969	Mass. Co-operative Banks[3] April 30, 1969	Mass. Savings Banks[4] October 31, 1969
I. Cash and Deposits in Other Banks	1.17	8.60	4.05	.92
II. U. S. Government Obligations	4.85	6.53	7.05	6.74
III. Loans:				
(a) Real Estate Loans (including mortgage participation loans)	87.88	30.36	81.58	74.43
(b) Other Loans (including personal loans)	2.23	46.27	2.50	2.83
IV. Bank Premises (including leasehold improvements, furniture and fixtures)	1.08	.86	.67	.62
V. Other Investments	3.00	7.38	4.15	14.46
TOTAL[5]	100.21	100.00	100.00	100.00

	Federal Savings & Loan Associations in Mass.[1] December 31, 1970	Mass. Credit Unions[2] June 30, 1970	Mass. Co-operative Banks[3] April 30, 1970	Mass. Savings Banks[4] October 31, 1970
I. Cash and Deposits in Other Banks	1.44	10.43	2.49	.98
II. U. S. Government Obligations	5.44	5.47	8.35	5.72
III. Loans:				
(a) Real Estate Loans (including mortgage participation loans)	87.54	31.50	82.81	70.01
(b) Other Loans (including personal loans)	2.07	44.50	2.40	3.02
IV. Bank Premises (including leasehold improvements, furniture and fixtures)	1.09	.97	.62	.67
V. Other Investments	1.34	7.09	3.18	19.60
TOTAL[5]	98.92	100.00	100.00	100.00

	Federal Savings & Loan Associations in Mass.[1] December 31, 1971	Mass. Credit Unions[2] June 30, 1971	Mass. Co-operative Banks[3] April 30, 1971	Mass. Savings Banks[4] October 31, 1971
I. Cash and Deposits in Other Banks	1.24	9.26	5.36	1.01
II. U. S. Government Obligations	5.60	5.00	6.84	5.16
III. Loans:				
(a) Real Estate Loans (including mortgage participation loans)	87.32	32.31	79.38	66.41
(b) Other Loans (including personal loans)	1.88	40.47	2.38	3.02
IV. Bank Premises (including leasehold improvements, furniture and fixtures)	1.08	.92	.66	.70
V. Other Investments	1.08	12.04	5.38	23.70
TOTAL[6]	98.20	100.00	100.00	100.00

	Federal Savings & Loan Associations in Mass.[1] December 31, 1972	Mass. Credit Unions[2] June 30, 1972	Mass. Co-operative Banks[3] April 30, 1972	Mass. Savings Banks[4] October 31, 1972
I. Cash and Deposits in Other Banks	.80	7.01	4.40	.99
II. U. S. Government Obligations	6.16	5.21	5.73	4.62
III. Loans:				
(a) Real Estate Loans (including mortgage participation loans)	87.70	30.06	80.43	65.26
(b) Other Loans (including personal loans)	1.87	41.53	2.28	2.98
IV. Bank Premises (including leasehold improvements, furniture and fixtures)	1.12	.88	.69	.72
V. Other Investments	2.15	15.31	6.47	35.43
TOTAL[5]	99.90	100.00	100.00	100.00

	Federal Savings & Loan Associations in Mass.[1] December 31, 1973[6]	Mass. Credit Unions[2] June 30, 1973	Mass. Co-operative Banks[3] April 30, 1973	Mass. Savings Banks[4] October 31, 1973
I. Cash and Deposits in Other Banks		4.95	3.46	.93
II. U. S. Government Obligations		4.39	4.93	3.33
III. Loans:				
(a) Real Estate Loans (including mortgage participation loans)	86.48	32.57	81.77	67.86
(b) Other Loans (including personal loans)		41.06	1.23	3.26
IV. Bank Premises (including leasehold improvements, furniture and fixtures)		.83	.71	.81
V. Other Investments		16.20	7.90	23.81
TOTAL[5]		100.00	100.00	100.00

FOOTNOTES

[1] Source: Federal Home Loan Bank of Boston.

[2] Source: Section B of the Annual Report of the Commissioner of Banks of the Commonwealth of Massachusetts.

[3] Source: Section A of the Annual Report of the Commissioner of Banks of the Commonwealth of Massachusetts.

[4] Source: Section C of the Annual Report of the Commissioner of Banks of the Commonwealth of Massachusetts.

[5] Any deviation from a total of 100% is due to the limited accuracy of computations of percentages which are rounded off to the hundreds column.

[6] In this year the Federal Home Loan Bank of Boston discontinued its breakdown of cumulative total assets into the categories used in this exhibit. Only real estate loan category remained in use.

Addendum.

[*Statement of Counsel*

The plaintiffs submitted the following material, *inter alia*, to the Massachusetts Supreme Judicial Court after oral argument in the case, and the defendants filed a timely objection to the submission. There is no indication in the record or opinion of the state court whether the materials were considered by the state court in its decision of the case.

The Annual Report of the Commissioner of Banks for 1973 shows that state-chartered credit unions had 32.57% of their assets invested in real estate loans. At the time there were 370 state-chartered credit unions in Massachusetts.]

MASSACHUSETTS CREDIT UNIONS WITH REAL ESTATE LOANS IN EXCESS OF FIFTY PERCENT OF TOTAL ASSETS *

Credit Union	Real Estate Loans	Total Assets	Percentage
Noddle Island (Boston)	6,394,000	9,947,000	64.2
Brockton Brotherhood	4,083,000	7,681,000	53.1
Crescent (Brockton)	20,443,000	27,223,000	75.0
Blue Hill (Brookline)	19,326,000	34,334,000	56.2
Brookline Municipal	2,126,000	3,933,000	54.0
Cambridge Portugese	3,502,000	4,821,000	72.6
Polish National (Chicopee)	5,970,000	9,883,000	60.4
Everett	1,940,000	3,691,000	52.5
Workers (Fitchburg)	13,989,000	25,049,000	55.8
Jeanne d'Arc (Lowell)	9,078,000	15,840,000	57.3
Community (Lynn)	2,762,000	4,414,000	62.5
St. Jean's (Lynn)	5,306,000	7,748,000	68.4
St. Anne's (New Bedford)	1,221,000	1,747,000	69.8
Hellenic (Peabody)	10,550,000	14,755,000	71.5
Rockland	39,578,000	67,687,000	58.4
St. Joseph's (Salem)	4,465,000	6,102,000	73.1
Southbridge	5,386,000	10,138,000	53.1
Webster	15,275,000	23,460,000	65.1
Wenel Co. (W. Springfield)	2,242,000	4,165,000	53.8
Marquette (Winchendon)	1,322,000	1,531,000	86.3

* Source: Annual Report of the Commissioner of Banks for 1973, Section B, Credit Unions. The dollar amounts of real estate loans and total assets are rounded to the nearest thousand dollars. Credit Unions with less than $1,000,000 in real estate loans are excluded.

Opinion of Supreme Judicial Court.

[The opinion of the Massachusetts Supreme Judicial Court has been reproduced as Appendix A to the Jurisdictional Statement.]

Notice of Appeal.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH.

No. 641

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON & others,
Appellants

v.

STATE TAX COMMISSION & another,
Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that First Federal Savings and Loan Association of Boston; Boston Federal Savings and Loan Association; Colonial Federal Savings and Loan Association; Security Federal Savings and Loan Association of Brockton; Second Federal Savings and Loan Association; Freedom Federal Savings and Loan Association (formerly First Federal Savings and Loan Association of Worcester); Union Federal Savings and Loan Association of Boston; Metropolitan Federal Savings and Loan Association (merged into Metropolitan Savings Bank which in turn merged into Union Warren Savings Bank); Bay State Federal Savings and Loan Association; First Federal Savings and Loan Association of Fall River; First Federal Savings and Loan Association of Cape Cod; First Federal Savings and Loan Association of Lowell;

Family Federal Savings and Loan Association (formerly Fitchburg Federal Savings and Loan Associations); Natick Federal Savings and Loan Association; Union Federal Savings and Loan Association; Plymouth Federal Savings and Loan Association; Revere Federal Savings and Loan Association; Middlesex Federal Savings and Loan Association; Winter Hill Federal Savings and Loan Association; Waltham Federal Savings and Loan Association; Mutual Federal Savings and Loan Association of Whitman; First Federal Savings and Loan Association of Attleboro; Edward Everett Federal Savings and Loan Association; Scituate Federal Savings and Loan Association; Milford Federal Savings and Loan Association; Monument Federal Savings and Loan Association; Leader Federal Savings and Loan Association; Foxboro Federal Savings and Loan Association; People's Federal Savings and Loan Association; Bay Colony Federal Savings and Loan Association; Montello Federal Savings and Loan Association of Brockton (merged into Home Federal Savings and Loan Association); Home Federal Savings Association; Home Owners Federal Savings and Loan Association; and Northeast Federal Savings and Loan Association (merged into First Federal Savings and Loan Association of Worcester, now named Freedom Federal Savings and Loan Association), plaintiffs in the above-captioned case, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered in this action on May 3, 1977, ordering that a declaratory judgment be entered in the Superior Court for the County of Suffolk.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Chester M. Howe
Chester M. Howe
Counsel for Appellants

Supreme Court of the United States.

No. 77-334

FIRST FEDERAL SAVINGS AND
LOAN ASSOCIATION OF BOSTON, ET AL.,
APPELLANTS,
v.
STATE TAX COMMISSION, ET AL.

APPEAL from the Supreme Judicial Court of Massachusetts.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

November 14, 1977

Supreme Court, U. S.
FILED
OCT 21 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON ET AL.,
APPELLANTS,

v.

STATE TAX COMMISSION ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Motion to Dismiss
and
Brief in Support of Motion to Dismiss.

FRANCIS X. BELLOTTI,
Attorney General,
Commonwealth of Massachusetts,
JOHN E. BOWMAN, JR.,
Assistant Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1010
Attorneys for the Appellees.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of contents

Motion to dismiss

Brief in support of motion to dismiss

Opinion below 1

Jurisdiction 2

Statutes involved 2

Questions presented 4

Statement of the case 5

Argument 6

I. Introduction 6

II. The Massachusetts tax is authorized by 12 U.S.C. § 1464(h) 7

A. The claim that the Massachusetts statute is not within the categories of taxes authorized by 12 U.S.C. § 1464(h) is insubstantial on its face and not within the jurisdiction of the Court 8

B. Massachusetts does not impose a "greater" tax on federal savings and loan associations in violation of 12 U.S.C. § 1464(h) 11

C. Massachusetts' failure to assess credit unions the same tax it collects from federal savings and loan associations and state savings and cooperative banks does not present a substantial federal question 17

III. Claims that the state tax violates the United States Constitution are neither substantial nor supported by the record 20

IV. Reasons for denying plenary consideration 25

Conclusion 26

Table of Authorities Cited.

CASES.

Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959) 24

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 24

Baltic Mining Co. v. Massachusetts, 231 U.S. 68 (1913) 9

Bank of Redemption v. Boston, 125 U.S. 60 (1888) 12

Comm'r of Corporations & Taxation v. Flaherty, 306 Mass. 461 (1940) 18n

Comm'r of Insurance v. Commonwealth Mutual Liability Ins. Co., 308 Mass. 385 (1941) 9

Commonwealth v. Provident Institution for Savings, 94 Mass. (12 Allen) 312 (1866) 9

Commonwealth v. The People's Five Cents Savings Bank, 87 Mass. (5 Allen) 428 (1862) 8

Complete Auto Transit, Inc. v. Brady, ____ U.S. ____, 97 S. Ct. 1076 (1977) 21, 24

De Sylva v. Ballentine, 351 U.S. 570 (1956) 10

First Federal Savings & Loan Assn. v. State Tax. Comm'n, ____ Mass. ____, Mass. Adv. Sh. (1977) 895, 363 N.E. 2d 474 (1977) 1, 6, 8, 9, 10n, 11, 12 et seq.

First Federal Savings & Loan Assn. of New Haven v. Connelly, 142 Conn. 483, 115 A. 2d 455 (1955) 18

First Federal Savings & Loan Assn. of New Haven v. Connelly, 350 U.S. 927 (1956) 17

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 9, 10

General Motors Corp. v. Washington, 377 U.S. 436 (1964) 21, 23

Greenfield Savings Bank v. Commonwealth, 211 Mass. 207 (1912) 8

Laurens Federal Savings & Loan Assn. v. South Carolina Tax Comm'n, 365 U.S. 517 (1961) 12, 13, 17, 24

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 13, 23, 24

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) 24

Madden v. Kentucky, 309 U.S. 83 (1940) 17, 21, 24

Manchester Federal Savings & Loan Assn. v. State Tax Comm'n, 105 N.H. 17, 191 A. 2d 529 (1963) 18

Michigan National Bank v. Michigan, 365 U.S. 467 (1961) 12, 13, 14, 15, 16, 24

Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954) 23

National Bellas Hess, Inc. v. Illinois Dept. of Revenue, 386 U.S. 753 (1967) 20, 24

National Geographic Society v. California Bd. of Equalization, ____ U.S. ____, 97 S. Ct. 1386 (1977) 20, 22

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 23

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 22, 23

Norton Co. v. Illinois Dept. of Revenue, 340 U.S. 534 (1951) 21

Portland Bank v. Apthorp, 12 Mass. (12 Tyng) 252 (1815) 8

Provident Institution v. Massachusetts, 73 U.S. (6 Wall.) 611 (1867) 9, 10

Provident Institution for Savings v. Commonwealth, 259 Mass. 124 (1927) 8, 9

Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204 (1946) 10

Society for Savings v. Coite, 73 U.S. (6 Wall.) 594 (1867) 9, 10

Springfield Inst. for Savings v. Worcester Federal Savings & Loan Assn., 329 Mass. 184 (1952) 18n

Standard Pressed Steel Co. v. Washington Dept. of Revenue, 419 U.S. 560 (1975) 20, 21, 24

State v. Minnesota Federal Savings & Loan Assn., 218, Minn. 229, 15 N.W. 2d 568 (1944) 18

State Tax Comm'n v. John H. Breck, Inc., 336 Mass. 277 (1957) 8, 9

Tradesmens National Bank v. Oklahoma Tax Comm'n, 309 U.S. 560 (1940) 9, 10, 11, 12

United States v. State Tax Comm'n, 348 F. Supp. 397 (D. Mass. 1972) 5n, 18

United States v. State Tax Comm'n, 481 F. 2d 963 (1st Cir. 1973) 5, 6, 9, 11, 12, 13

Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) 20, 21, 22

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution

Commerce Clause, Art. I, § 8 4, 20, 23, 24

Fourteenth Amendment

Due Process Clause 4, 20, 24

Equal Protection Clause 4, 17, 20, 23, 24

12 U.S.C.

§ 548 12, 13, 24, 25n

§ 1433 24

§ 1437 5n

§ 1464(a) 19

§ 1464(h) 2, 4, 5n, 7, 8, 10, 11 et seq.

§ 1464(i) 19n

§ 1726(a) 18n

§ 1726(b) 15

§ 1752a 18n

§ 1771 18n

§ 1781(a) 18n

28 U.S.C. § 1257 2, 10

50 U.S.C. App. § 532(3) 22n

Federal Credit Union Act, 12 U.S.C. §§ 1751 et seq. 18n

Federal Reserve Act, § 19, 12 U.S.C. §§ 221 et seq. 19n

Home Owners Loan Act of 1933, § 5(h) 7

Judiciary Act of 1789, § 25 10

Soldiers' and Sailors' Civil Relief Act of 1940 22n

State Taxation of Depositories Act, Pub. L. 93-100, § 7, 87 Stat. 342 (Aug. 16, 1973) 23, 25n

Pub. L. 91-156, 83 Stat. 434 (Dec. 24, 1969) 13n

§ 2(a) 13n

§ 4 25n

Pub. L. 91-206, 84 Stat. 49 (March 10, 1970) 18n

Pub. L. 94-222, § 1, 90 Stat. 197 25n
Mass. Gen. Laws c. 63
§ 11 2, 5, 6, 8, 9, 10n, 13 et seq.
§ 11(a)(1) 4, 5, 6, 7, 15, 16, 25
§ 11(a)(2) 6, 7
§ 11(b)(1) 4, 5, 6, 7, 15, 16, 25
§ 11(b)(2) 6, 7
Mass. Gen Laws c. 93, § 34 6n
Mass. Gen. Laws c. 168
§ 58(1) 15
§ 58(3) 16
§ 67 19n
§ 73A 19n
§ 73B 19n
§ 73C 19n
Mass. Gen. Laws c. 170
§ 34 19n
§ 34A 18n
§§ 37 et seq. 16
§ 38 15
§ 49 19n
§ 50 19n
Mass. Gen. Laws c. 171
§ 2 19
§ 21 19
§ 24 19
§ 35 18n
Mass. Gen. Laws c. 244
§ 1 22n
§ 11 22n

Uniform Commercial Code
§ 9-103(3) 23
§ 9-503 22n

REGULATIONS.

12 C.F.R.
§ 544.8(c)(1)(i) 15n
§ 563.11(a), (c) 16
§ 563.13(a)(1) 15
Internal Revenue Code, § 591 11n

MISCELLANEOUS.

1928 Federal Reserve Bulletin 426 19n
1934 Federal Reserve Bulletin 304 19n
1976 U.S. Code, Cong. & Admin. News 288 25n

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON ET AL.,
APPELLANTS,

v.

STATE TAX COMMISSION ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Motion to Dismiss.

Appellees move that the Court dismiss the appeal for lack of a substantial federal question. Dismissal of certain questions presented by Appellants is also moved as the decision below is based on an adequate, non-federal ground. As further grounds for dismissal the Appellees state that the

decision by the Massachusetts Supreme Judicial Court is plainly correct and does not present issues worthy of plenary consideration by this Court.

Respectfully submitted,
FRANCIS X. BELLOTTI,
Attorney General,
Commonwealth of Massachusetts,
JOHN E. BOWMAN, JR.,
Assistant Attorney General.

Date: October 21, 1977.

Department of the Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1010

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON ET AL.,
APPELLANTS,

v.

STATE TAX COMMISSION ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief in Support of Motion to Dismiss.

Opinion Below.

The opinion of the Massachusetts Supreme Judicial Court is reported at Mass. Adv. Sh. (1977) 895 and at 363 N.E. 2d 474 (1977). The opinion is reprinted in Appendix A to the Jurisdictional Statement.

Jurisdiction.

Appellants invoke the jurisdiction of this Court by appeal pursuant to 28 U.S.C. § 1257(2).

Statutes Involved.

12 U.S.C.A. § 1464(h) (1969):

> No State, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

Mass. Gen. Laws. Ann. c. 63, § 11 (West, 1977):

> Every savings bank as defined in chapter one hundred and sixty-eight, every cooperative bank as defined in chapter one hundred and seventy and every state or federal savings and loan association located in the commonwealth shall pay to the commissioner an annual excise equal to the following:
>
> (*a*) on or before the twenty-fifth day of the seventh month of the taxable year, there shall be paid (1) six hundred twenty-seven one thousandths per cent of a reasonable estimate of its net operating income, as hereinafter defined, for the taxable year, and (2) one-sixteenth of one per cent of the average amount of its deposits or of its savings accounts and share capital for

> the first six months of the taxable year, after deducting from such average amounts (*i*) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (*ii*) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to a tax by the commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of the commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of such six-month period; and
>
> (*b*) on or before the twenty-fifth day of the first month following the close of the taxable year, there shall be paid (1) one and two hundred fifty-four one thousandths per cent of its net operating income, as hereinafter defined, for the taxable year, less the estimated amount previously paid with respect to such income, and (2) one-sixteenth of one per cent of the average amounts of its deposits or of its savings accounts and share capital for the second six months of the taxable year, after deducting from such average amount (*i*) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (*ii*) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by this commonwealth the unpaid balances on such

of its loans secured by the mortgage of real estate located outside of this commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of the taxable year.

For the purpose of this section, "net operating income" shall mean gross income from all sources, without exclusion, for the taxable year, less (*i*) operating expenses, (*ii*) net losses upon assets sold, exchanged or charged off as uncollectible during the taxable year, and (*iii*) minimum additions during the taxable years to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities; and "taxable year" shall mean any fiscal or calendar year or period for which the bank is required to make a return to the federal government. Federal and state taxes paid or accrued during the taxable year shall not be deductible in computing "net operating income".

Questions Presented.

1. Does 12 U.S.C. § 1464(h) authorize Massachusetts to impose on federal and loan associations domiciled in Massachusetts the franchise tax set forth in Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1)?

2. Does the Commerce Clause, the Due Process Clause, or the Equal Protection Clause of the United States Constitution exempt federal savings and loan associations domiciled in Massachusetts from the tax imposed by Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1)?

Statement of the Case.

The issue on appeal is whether Massachusetts may assess against federal savings and loan associations a portion of the tax set forth in Mass. Gen. Laws c. 63, § 11, which it also imposes on state-chartered savings banks and cooperative banks. Appellants are all thirty-four federally chartered savings and loan associations (hereinafter associations) located in Massachusetts. The associations filed suit in the state Superior Court nearly two years after the United States Court of Appeals abstained on similar claims raised by six of the associations as intervenors in a suit brought by the United States. *United States* v. *State Tax Comm'n*, 481 F. 2d 963 (1st Cir. 1973).[1]

The Superior Court reported the case to the Appeals Court without decision after the parties filed a stipulation of facts (A. 136 *et seq.*). The Supreme Judicial Court granted direct appellate review prior to hearing or decision in the Appeals Court. On May 3, 1977, the Massachusetts Supreme Judicial Court entered a declaratory judgment which affirmed the validity of Mass. Gen. Laws c. 63, § 11 (a)(1), (b)(1), and the associations filed a timely appeal.

---

[1]The United States filed suit on behalf of the Federal Home Loan Bank Board which oversees all federal savings and loan associations. 12 U.S.C. § 1437. The United States did not challenge the income-based portion of Mass. Gen. Laws c. 63, § 11, which is the subject of this litigation. The intervenor associations did, however, raise the same issues presented by this appeal.

The United States District Court and the Court of Appeals upheld the United States' claim that the deposits-based portion of the tax violated 12 U.S.C. § 1464(h). The Court of Appeals vacated the judgment entered for the State Tax Commission on the remaining claims and directed the associations to file suit in the state courts. *United States* v. *State Tax Comm'n*, 348 F. Supp. 397 (D. Mass. 1972), 481 F. 2d 963 (1st Cir. 1973).

On its face Mass. Gen. Laws c. 63, § 11, levies an indivisible "excise" tax, which is measured by a percentage of both "deposits" (§ 11(a)(2), (b)(2)) and "net operating income" (§ 11(a)(1), (b)(1)), on both the associations and state savings and cooperative banks. However, the state court litigation dealt solely with the income-based portion of the statute, because the associations (but not the state banks) are exempt from the deposits-based portion of the tax due to the judgment in *United States* v. *State Tax Comm'n, supra,* 481 F. 2d at 971. *First Federal Savings & Loan Assn.* v. *State Tax Comm'n*, ____ Mass. ____, 363 N.E. 2d 474, 478 (1977).[2]

Argument.

I. Introduction.

Massachusetts taxes the "franchise," *First Federal Savings & Loan Assn.*, 363 N.E. 2d at 480, of every "savings bank," "cooperative bank" and "state[3] or federal savings and loan association located in the commonwealth." Mass. Gen. Laws c. 63, § 11 (first par.). Under the express terms of the statute the franchise tax is assessed at a percentage of

[2]Mass. Adv. Sh. (1977) 895, 898. Hereinafter the decision in this case by the Massachusetts Supreme Judicial Court will be referred to as *First Federal Savings & Loan Assn.* For convenience all citations will be to the Northeastern Reporter.

[3]There is apparently only one savings and loan association with a Massachusetts charter. See Mass. Gen. Laws c. 93, § 34. The parties did not raise before the state courts any issues concerning state savings and loan associations, and none are presented to this Court. Accordingly, there will be no further mention of such banks. State credit unions will be discussed in Part II, C, of the Argument, *infra*.

both the taxpayer's "net operating income" (§ 11(a)(1), (b)(1)) and its "deposits" (§ 11(a)(2), (b)(2)). Federal associations and state savings and cooperative banks are treated identically; the statute makes no distinction in the tax rate or the basis upon which it is assessed.[4]

The associations' state law challenges to the statute have failed. This Court is now asked to review further the careful consideration the court below gave their claims that the tax is invalid as applied to the associations because (1) the United States Congress did not authorize the tax in 12 U.S.C. § 1464(h) and (2) the United States Constitution directly shields the associations from the tax. The Argument will address the two claims in turn.

II. The Massachusetts Tax is Authorized by 12 U.S.C. § 1464(h).

The Congress authorized state taxation of federal savings and loan associations in § 5(h) of the Home Owners Loan Act of 1933, 12 U.S.C. § 1464(h). Section 1464(h) gives permission to tax the associations if the tax is not "greater" than the tax levied on "similar" financing institutions. The associations claim that Massachusetts has violated both of these statutory restrictions and also that the Massachusetts tax does not fall within the categories of taxes to which, they argue, Congress limited its authorization in § 1464(h). The Massachusetts Supreme Judicial Court correctly upheld Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1), against all the arguments advanced by the associations. In this portion of the Argument the Appellees will address each of the federal statutory claims raised by the associations.

[4]The federal associations do not pay the deposit-based portion of the tax, however. See Statement of the Case at n. 2, *supra*.

A. *The Claim that the Massachusetts Statute Is Not Within the Categories of Taxes Authorized by 12 U.S.C § 1464(h) Is Insubstantial on its Face and Not Within the Jurisdiction of the Court.*

Section 1464(h) authorizes, *inter alia*, state taxes on the "franchise" of federal savings and loan associations. The state court held the Massachusetts statute levies a franchise tax which is measured by net operating income. *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 480. Thus the tax satisfies even the restrictive reading the associations would give § 1464(h).[5]

The state court's holding that Mass. Gen. Laws c. 63, § 11, is a franchise tax is consistent with its interpretations, dating back to 1815, of similar Massachusetts tax statutes. *E.g., Portland Bank* v. *Apthorp*, 12 Mass. (12 Tyng) 252, 255-56 (1815); *Commonwealth* v. *The People's Five Cents Savings Bank*, 87 Mass. (5 Allen) 428, 431 (1862); *Greenfield Savings Bank* v. *Commonwealth*, 211 Mass. 207, 208 (1912); *Provident Institution for Savings* v. *Commonwealth*, 259 Mass. 124, 126 (1927). The state court has also consistently ruled that a franchise tax does not lose its character merely because, as here, it is measured by income. *State Tax Comm'n* v. *John H. Breck, Inc.*, 336

[5]It is submitted that 12 U.S.C. § 1464(h) generally authorizes state taxes on federal savings and loan associations subject only to the requirement that the tax is not greater than taxes on similar state institutions. This argument was not presented to the state court, and it is not necessary to the decision of the case. The opinion below implicitly adopts the associations' argument, but it concludes the state tax is authorized by § 1464(h) as it is a "nondiscriminatory franchise tax" or, alternatively, a tax on the associations' "income." *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 480, 481 and n. 7. Even if this Court were to disagree with the conclusion that Massachusetts taxes the corporate franchise, affirmance of the judgment below would still be warranted as the tax is either on "such associations or their . . . income." 12 U.S.C. § 1464(h).

Mass. 277, 299 (1957); *Comm'r of Insurance* v. *Commonwealth Mutual Liability Ins. Co.*, 308 Mass. 385, 394-96 (1941). See *Provident Institution for Savings* v. *Commonwealth, supra*, at 125, 126; *Commonwealth* v. *Provident Institution for Savings*, 94 Mass. (12 Allen) 312, 313 (1866).

Prior decisions of this Court directly support the characterization of the state tax adopted below. In *Provident Institution* v. *Massachusetts*, 73 U.S. (6 Wall.) 611 (1867), the Court considered an appeal from the Massachusetts Supreme Judicial Court arising under the predecessor statute to Mass. Gen. Laws c. 63, § 11. See *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 480; *United States* v. *State Tax Comm'n, supra*, 481 F. 2d at 967. The question presented was whether the Massachusetts tax was levied on the savings bank's franchise or on its property. *Provident Institution, supra*, at 623. The Court concurred with the holding below that the franchise was the object of the tax although, as here, the statute did not use that term. *Id.* at 625-28, 631. Later cases have reaffirmed the *Provident Institution* decision. *E.g., Tradesmens National Bank* v. *Oklahoma Tax Comm'n*, 309 U.S. 560, 564-65 (1940) (state tax on national bank); *Baltic Mining Co.* v. *Massachusetts*, 231 U.S. 68, 82-83 (1913) (state tax on business corporations). This Court's decisions also support the Massachusetts court's conclusion that a franchise tax may be measured by income. *Tradesmens National Bank* v. *Oklahoma Tax Comm'n, supra*, at 563-64, 565. See *Provident Institution* v. *Massachusetts, supra*, at 627 (franchise tax measured by deposits); *Society for Savings* v. *Coite*, 73 U.S. (6 Wall.) 594, 608 (1867) (same).

The state court's characterization of Mass. Gen. Laws c. 63, § 11, as a franchise tax is thus a state law decision which is completely consistent with prior decisions. This Court lacks jurisdiction to decide such questions. *Fox Film*

Corp. v. *Muller*, 296 U.S. 207, 210-11 (1935). While the interpretation of "franchise" as used in § 1464(h) is ultimately a federal law question, there is no reason in this case to depart from the usual course of looking to state law for the content of such terms in Congressional enactments. *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956); *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 210 (1946).

In fact, in *Provident Institution* v. *Massachusetts, supra*, this Court held it lacked jurisdiction under § 25 of the Judiciary Act of 1789 (now 28 U.S.C. § 1257) to review a decision by the Massachusetts court. The issue was whether the state tax could be measured in part by the bank's investments in tax-exempt federal securities. This Court upheld the state tax, relying on the state court's characterization of the tax as a levy on the bank's franchise. *Id.* at 623, 629-30. See also *Society for Savings* v. *Coite, supra*; *Tradesmens National Bank* v. *Oklahoma Tax Comm'n, supra.*

The federal interest in the *Provident Institution* case was of at least equal significance to the federal interest asserted by the associations here. This case pales by comparison when one considers that here, unlike *Provident Institution*, the Congress has expressly authorized state taxation. The associations' challenge warrants no further consideration by the Court.[6]

[6]The associations also ask the Court to review the holding below that dividends paid to their depositors are deductible "operating expenses" under Mass. Gen. Laws c. 63, § 11 (final par. (i)). The state court carefully reviewed this question, as the statute provides no definition of operating expenses and there was no prior judicial construction of the term. The holding, however, was based on a determination of legislative intent. *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 478. There is no jurisdiction to review this decision of state law. *Fox Film Corp.* v. *Muller, supra*; *Provident Institution* v. *Massachusetts, supra.*

There is also no discriminatory effect on federal instrumentalities because the court's construction of the deduction for operating expenses

B. *Massachusetts Does Not Impose a "Greater" Tax on Federal Savings and Loan Associations in Violation of 12 U.S.C. § 1464(h).*

The associations invite comparison of the tax burden borne by federal savings and loan associations in Massachusetts with the tax on state savings and cooperative banks. Their argument, although seemingly complex, stumbles at the threshold for a simple reason. As noted above, Massachusetts measures its franchise tax by a combination of net operating income and deposits, but only state savings and cooperative banks actually pay the deposits-based portion of the tax due to the judgment entered in *United States* v. *State Tax Comm'n*, 481 F. 2d 963, 971 (1st Cir. 1973). While there is nothing in the record on the actual tax payments by the various institutions, it is clear that the franchise of a state savings or cooperative bank is taxed at a higher rate than the franchise of a federal savings and loan association.[7] See *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 478, 481, n. 8.

In *Tradesmens National Bank* v. *Oklahoma Tax Comm'n, supra*, this Court stated it was necessary, in cases

applies equally to the federal associations and to state savings and cooperative banks. Appellants' argument verges on the frivolous when one considers that 12 U.S.C. § 1464(h) also authorizes taxation of the associations' "income" and that the term "income" has no fixed or settled meaning. Massachusetts is under no federal obligation to provide any deductions from gross income in assessing its tax. See *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 481 and n. 7. The associations' reference to § 591 of the Internal Revenue Code is inapposite.

[7]State banks are taxed 1.254 per cent of net operating income plus 1.250 per cent of deposits (or 2.504 per cent annually). Federal associations are taxed only 1.254 per cent of net operating income.

such as this one, to examine the "whole tax structure."[8] *Id.* at 568. *Accord, Michigan National Bank* v. *Michigan*, 365 U.S. 467, 468-70 (1961); *Bank of Redemption* v. *Boston*, 125 U.S. 60, 66-67 (1888). Here such examination indicates the federal associations received preferential treatment. See *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 481, n. 8. The purpose of 12 U.S.C. § 1464(h) is to bar "discriminatory state taxation" of federal savings and loan associations. *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Comm'n*, 365 U.S. 517, 523 (1961). In the absence of demonstrated discrimination on the record, the associations present no issue for decision. See *Michigan National Bank* v. *Michigan, supra*, at 482-83 (different tax rate assessed against national banks does not violate the prohibition in 12 U.S.C. § 548 against a "higher" tax merely because future changes in bank's deposits may alter the practical operation of tax).

Even though this Court has interpreted 12 U.S.C. § 1464(h) on only one occasion, *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Comm'n, supra*, plenary consideration of the appeal would not serve to clarify legal principles. The legal test enunciated by *Laurens* is clear, and it was correctly stated and applied by the state court in its decision of the case.[9] *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 480. See also *United States*

[8] In the *Tradesmens National Bank* case income from federal securities was included in the tax base of national banks but excluded from the tax base of other corporations. This Court held there was no discrimination because national banks were not assessed the wholly separate corporate license tax paid by the other corporations. *Id.* at 562, 568.

[9] The assertion at page 14 of the Jurisdictional Statement that the Supreme Judicial Court did not refer to the *Laurens* decision is erroneous.

v. *State Tax Comm'n, supra*, at 969. Moreover, this Court has declared that § 1464(h) is "*in pari materia*" with 12 U.S.C. § 548, which governs state taxation of national banks. Thus the associations and the lower courts can look to the more than fifty-five consistent decisions by this Court in national bank cases when and if the need should arise for further construction of § 1464(h). *Michigan National Bank* v. *Michigan, supra*, at 472-73, 481.[10]

The criteria this Court set forth in the *Michigan National Bank* decision are sufficient to dispose of the associations' arguments in this case. There the Court upheld a state tax which, on its face, imposed on national banks a burden eight times greater than the tax on other banks. The opinion reiterated that the purpose of 12 U.S.C. § 548 was to prohibit state tax structures which create "'an unequal and unfriendly competition'" or which "in practical operation . . . have a discriminatory effect." *Id.* at 473, 470. A finding of "tax equivalence" will satisfy the legal standard. Thus it is not necessary to find "exact equality in result" in order to sustain the state tax. *Id.* at 474. *Cf. Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

The tax burden Massachusetts imposes on the associations easily satisfies the standards defined in both *Michigan National Bank* and *Laurens*. On its face, Mass. Gen. Laws c. 63, § 11, treats the federal associations and state savings and cooperative banks identically. In practical operation, the tax burden falls more heavily on the state banks. Thus the tax has no discriminatory effect on federal interests, and it creates no unequal and unfriendly competition.

The associations nevertheless claim that the statute violates 12 U.S.C. § 1464(h) because Massachusetts permits a deduction from gross income for "minimum additions . . .

[10] Congress amended 12 U.S.C. § 548 effective January 1, 1972. Pub. L. 91-156, § 2(a) (Dec. 24, 1969), 83 Stat. 434. The cases and discussion in the Argument refer to § 548 as it existed prior to Pub. L. 91-156.

to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities." Mass. Gen. Laws c. 63, § 11 (final par., (iii)). Their argument is that federal associations have lower guaranty fund requirements and that they consequently have lower deductions and are taxed more heavily. It is clear, of course, that here the associations seek "exact equality in result"[11] while "tax equivalence" is all the law requires. *Michigan National Bank, supra,* at 474. The factual record does not, in any event, support the associations' argument.

The factual record before the Court is, at best, inconclusive. The clearest support for the associations' claim is in the aggregated comparison of additions to the guaranty fund for all cooperative banks (A. 229), savings banks (A. 230) and federal savings and loan associations (A. 231). Yet in the most recent year (1974) the associations received a greater deduction than either state savings or cooperative banks for additions to the guaranty fund. In comparison to savings banks during the six previous years, the associations got a greater deduction one year (1968), an equal deduction one year (1969), and lesser deductions for four years (A. 229-31).

Another flaw in the associations' case is that their argument is based on comparison of dissimilar items. The record presents only the "assets" of all the associations and state savings and cooperative banks (A. 160-232).[12] The

[11] In actuality, the associations seek complete freedom from taxation while the state savings and cooperative banks would continue to pay the complete franchise tax under Mass. Gen. Laws c. 63, § 11.

[12] Direct comparisons are impossible even at this point, as the record gives only the aggregate assets of all 34 federal savings and loan associations (A. 231).

franchise tax, however, is measured by "net operating income." Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1). It is evident that income represents a return on investment (see A. 158) and bears no necessary relationship to the size of a bank's assets. This Court's analysis in the *Michigan National Bank* case, *supra,* amply demonstrates the inaccurate picture presented by such comparisons.[13]

Assets do not even provide a satisfactory basis for comparing the required addition to the guaranty fund which the various institutions may deduct under Mass. Gen. Laws c. 63, § 11, to arrive at net operating income. For example, a cooperative bank's contribution to the guaranty fund is a portion of its "net profits," Mass. Gen. Laws c. 170, § 38, while a federal savings and loan association's contribution is a portion of its "checking and savings account balances." 12 C.F.R. § 563.13(a)(1) (1977); 12 U.S.C. § 1726(b). Moreover, the "minimum additions" which are deductible under the statute are equal for state savings banks and federal savings and loan associations. Mass. Gen. Laws c. 168, § 58(1) (1/8 of 1 per cent semi-annually); 12 C.F.R. § 563.13(a)(1) (1977) (1/4 of 1 per cent annually).[14]

[13] On the complete factual record in that case the Court was able to ascertain that national bank net earnings were 31 per cent on their capital account compared to 3.4 per cent for other banks and that a share in a national bank controlled 21 times greater moneyed capital than a share in other banks. *Id.* at 472, 477.

[14] Paragraph 10 of the federal associations' charters originally required "general reserves" equal to 10 per cent of "capital" (A. 145, 148). The Federal Home Loan Bank Board subsequently gave all associations the option of amending their charters to the lower reserve requirement stated in the text (A. 150). 12 C.F.R. § 544.8(c)(1)(i). Four of the plaintiff associations have not amended their charters (A. 152, n. 1). Thus they lack standing to challenge the Massachusetts statute, and they present no actual case or controversy for decision on this issue.

The essential point, which is obscured by the associations' arguments, is that the guaranty fund is a portion of surplus which, by law, is not available either for distribution to the shareholders (depositors) or for investment. See, *e.g.*, Mass. Gen. Laws c. 168, § 58(3); 12 C.F.R. § 563.11 (a), (c). The Massachusetts legislature thus could reasonably exclude the guaranty fund from the net operating income which is the measure of the franchise tax imposed by Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1). There is, however, no precise relationship between net operating income and the guaranty fund.

Instead, the tax deduction for additions to the guaranty fund is a variable which is dependent on (1) the annual economic performance of the bank, or (2) the size of its preexisting reserves, or both. For example, a net annual loss of deposits (disintermediation) would ordinarily result in a reduced guaranty fund requirement and no tax deduction. Likewise, an institution which has achieved the required reserves and does not continue to grow will not be entitled to any further deduction in computing its taxable net operating income.

Finally, even if one accepts the associations' claim that their guaranty fund deduction is lower, the higher guaranty fund requirements imposed on state savings and cooperative banks reduces their "deposits available for investment." *Michigan National Bank*, *supra*, at 482. See, *e.g.*, Mass. Gen. Laws c. 170, §§ 37 *et seq.* (distribution of net profits). Thus, like the national bank shareholders in the *Michigan National Bank* case, shareholders in federal savings and loan associations in Massachusetts control greater capital than shareholders in state institutions. *Id.* at 477, 479, 482. From this perspective the Massachusetts tax ". . . is realistic from a business standpoint, does not result in discrimination, is economically sound and is fair to each type of taxpayer." *Id.* at 482.

In sum, the legal principles are settled and were correctly applied in the decision of this case. The associations have failed to carry their burden ". . . to negative every conceivable basis which might support [the tax]." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940) (state tax challenged under Equal Protection Clause). The federal questions are not substantial, and they are not worthy of plenary consideration.

C. *Massachusetts' Failure to Assess Credit Unions the Same Tax It Collects from Federal Savings and Loan Associations and State Savings and Cooperative Banks Does Not Present a Substantial Federal Question.*

The associations maintain that Mass. Gen. Laws c. 63, § 11, is fatally underinclusive because it reaches only state savings and cooperative banks and not state-chartered credit unions. This Court has held, however, that the omission of credit unions from a state tax did not present a substantial federal question under 12 U.S.C. § 1464(h). *First Federal Savings & Loan Assn. of New Haven* v. *Connelly*, 350 U.S. 927 (1956).

The associations' claim must, in any event, be considered in light of the Congressional purpose in § 1464(h) to bar discriminatory state taxation of federal savings and loan associations. *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Comm'n*, *supra*, at 523. Their argument that "other similar" local institutions in § 1464(h) must be read to mean *all* similar local institutions lacks substance where Massachusetts has satisfied the statutory purpose by classifying state savings banks and cooperative banks — which are more important institutions than credit unions — with federal savings and loan associations under Mass. Gen. Laws c. 63, § 11.

Moreover, the four courts which have given plenary consideration to the question uniformly concurred with the ruling below that credit unions are not "similar" institutions within the meaning of § 1464(h).[15] *First Federal Savings & Loan Assn. of New Haven* v. *Connelly*, 142 Conn. 483, 492, 115 A. 2d 455, 459 (1955); *Manchester Federal Savings & Loan Assn.* v. *State Tax Comm'n*, 105 N.H. 17, 19-21, 191 A. 2d 529, 531-32 (1963); *State* v *Minnesota Federal Savings & Loan Assn.*, 218 Minn. 229, 238-41, 15 N.W. 2d 568, 573-74 (1944); *United States* v. *State Tax Comm'n*, 348 F. Supp. 397, 400 (D. Mass. 1972), *affirmed on other grounds*, 481 F. 2d 963, 970 (1st Cir. 1973). The United States Congress[16] and the Federal Re-

[15] *First Federal Savings & Loan Assn., supra*, 363 N.E. 2d at 483-84. In prior decisions the Supreme Judicial Court held state savings and cooperative banks were similar to federal savings and loan associations. *Springfield Inst. for Savings* v. *Worcester Federal Savings & Loan Assn.*, 329 Mass. 184 (1952); *Comm'r of Corporations & Taxation* v. *Flaherty*, 306 Mass. 461 (1940).

[16] In 1934, the year after it created federal savings and loan associations, Congress passed the Federal Credit Union Act, 12 U.S.C. §§ 1751 *et seq.* Credit unions were originally supervised by the Bureau of Federal Credit Unions located in the Department of Health, Education & Welfare. In 1970 Congress created an independent executive agency, the National Credit Union Administration. 12 U.S.C. § 1752a, Pub. L. 91-206 (March 10, 1970), 84 Stat. 49.

Deposit insurance and the convertibility of state and federal charters are two other indicators of the dissimilarity between credit unions and the other institutions. The National Credit Union Administration may insure federal and state credit unions. 12 U.S.C. § 1781(a). See Mass. Gen. Laws c. 171, § 35. The Federal Savings and Loan Insurance Corporation insures federal savings and loan associations and state cooperative banks and building and loan, savings and loan, and homestead associations. 12 U.S.C. § 1726(a). See Mass. Gen. Laws c. 170, § 34A.

A federal credit union may be converted into a state credit union and *vice versa*. 12 U.S.C. § 1771. A federal savings and loan association may convert to a state chartered federal savings and loan "type of

serve Board[17] have also distinguished credit unions from federal savings and loan associations. Finally, two statutory restrictions on credit unions are particularly noteworthy:

(1) credit unions may lend only to "members" (Mass. Gen. Laws c. 171, §§ 2, 21, 24); the other institutions, including the associations, may do business with outsiders, and
(2) credit unions must give "preference" to "personal loans" (*id.* at § 24); the other institutions, particularly the associations, give preference to home mortgage loans. (Compare Mass. Gen. Laws c. 171, § 2, with 12 U.S.C. § 1464(a).)

Thus there is no conflict of legal authority on this issue for the Court to resolve, and Massachusetts has not singled out a federal instrumentality for discriminatory treatment. In the final analysis, decision of this issue would have little precedential value as it would apply only to Massachusetts. The organization of the banking industry and the tax structure in other states would require individualized

institution," 12 U.S.C. § 1464(i); Mass. Gen. Laws c. 168, § 73C (savings bank); c. 170, § 50 (cooperative bank). Any member of a Federal Home Loan Bank may become a federal savings and loan association. 12 U.S.C. § 1464(i). Membership in the Federal Home Loan Bank is limited to savings and loan, building and loan, and homestead associations plus cooperative and savings banks and insurance companies. 12 U.S.C. § 1464(a). See Mass. Gen. Laws c. 168, §§ 67, 73A, 73B (savings bank); c. 170, §§ 34, 49 (cooperative bank).

[17] The Board has classified banks in order to administer the reserve requirements under § 19 of the Federal Reserve Act, 12 U.S.C. §§ 221 *et seq.* Credit unions are included in the definition of bank while federal savings and loan associations are excluded. Rulings of the Federal Reserve Board, 1928 *Federal Reserve Bulletin* 426, 1934 *Federal Reserve Bulletin* 304.

decision. The fact that the question has arisen in only four states since 1933 indicates it is not of widespread importance.

III. Claims that the State Tax Violates the United States Constitution Are Neither Substantial Nor Supported by the Record.

The associations also claim that the tax Massachusetts levies against their franchises violates the Commerce Clause (Art. I, § 8) and the Due Process Clause of the Fourteenth Amendment. These claims will be discussed jointly because the two clauses are "closely related" and rarely analyzed separately where state power to tax businesses engaged in interstate commerce is drawn into question. *National Bellas Hess, Inc.* v. *Illinois Dept. of Revenue*, 386 U.S. 753, 756 (1967). See, *e.g.*, *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue*, 419 U.S. 560 (1975). The argument will then address the associations' separate contention that the state statute offends the Equal Protection Clause of the Fourteenth Amendment.

The basis for the associations' argument that the state tax violates the Commerce Clause and Due Process Clause is solely that a portion of their loans is secured by real estate located outside Massachusetts. As a matter of law, it is clear that the associations enjoy no constitutional immunity from the state tax as "'[e]ven interstate commerce must pay its way.'" *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938). All thirty-four of the associations are domiciled in Massachusetts. Thus each of them has a substantial nexus to Massachusetts and enjoys benefits and protections conferred by the state. See *National Geographic Society* v. *California Bd. of Equalization*, ____ U.S. ____, ____, 97 S. Ct. 1386, 1389 (1977).

The constitutional claim thus rests solely on the facts. The court below carefully reviewed the record and concluded it was "devoid" of evidence to support an exemption from the tax. *First Federal Savings & Loan Assn.*, *supra*, 363 N.E. 2d at 482.[18] The associations have failed to satisfy "[t]he general rule . . . that a taxpayer claiming immunity from a tax has the burden of establishing his exemption." *Norton Co.* v. *Illinois Dept. of Revenue*, 340 U.S. 534, 537 (1951). *Accord*, *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue*, *supra*, at 563; *Madden* v. *Kentucky*, *supra*, at 88. There is no reason in this case for the Court to depart from its customary practice of leaving undisturbed the facts found by state courts. *General Motors Corp.* v. *Washington*, 377 U.S. 436, 441-42 (1964).

The associations make two unsuccessful efforts to overcome the deficiencies in their case. First, they seek to characterize the statute as a tax on "gross receipts." Jurisdictional Statement, p. 24. Reliance on this formalism — apart from the inaccuracy of the characterization — is misplaced: the test is ". . . whether the tax produces a forbidden effect." *Complete Auto Transit, Inc.* v. *Brady*, ____ U.S. ____, ____, 97 S. Ct. 1076, 1084 (1977). Moreover, gross receipts taxes were upheld even prior to the *Complete Auto Transit* decision last Term. *E.g.*, *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue*, *supra*; *General Motors Corp.* v. *Washington*, *supra*; *Western Live Stock* v. *Bureau of Revenue*, *supra*.

Next, the associations ask this Court to take "judicial notice" that it is "inconceivable" that the associations (or some of them) did not record mortgages in neighboring

[18] Particularly pertinent is the finding that "[t]he record does not show the extent of the contacts of any association with any other State . . .." *Id.* at 481.

states or that "inevitably" forclosure proceedings were initiated in courts outside Massachusetts.[19] Jurisdictional Statement, p. 24. Here the associations ask the Court to rely on "abstractions" or a "possibility," which is an insufficient basis for constitutional decision. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 462-63 (1959).

Moreover, the associations' reliance on the decision last Term in *National Geographic Society* v. *California Bd. of Equalization*, *supra*, is inapposite, as the opinion carefully notes that it does not adopt the "'slightest presence' standard of constitutional nexus." *Id.* at 1390. The Court upheld California's tax on the Society, which was domiciled in the District of Columbia, because it had offices in California. By contrast, the associations are domiciled in Massachusetts and have no offices outside the state. Perhaps some of the associations send "itinerant drummers" into other states to solicit business, but such facts, if true, would not lay a sufficient constitutional foundation for the other states to tax the associations. *Northwestern States Portland Cement Co.* v. *Minnesota*, *supra*, at 458. See also *National Geographic Society* v. *California Bd. of Equalization*, *supra*; *Western Live Stock* v. *Bureau of Revenue*, *supra*.

In the absence of evidence to the contrary, one may assume the associations' loans secured by out-of-state real estate were negotiated with Massachusetts borrowers in Massachusetts and are also secured by Massachusetts real estate, which would obviate any dispute as to the constitutionality of the Massachusetts franchise tax. See *Western Live Stock* v. *Bureau of Revenue*, *supra*, at 252-53. In any

[19]Mortgages may be foreclosed without resort to the courts. See, *e.g.*, Mass. Gen. Laws c. 244, § 1 (peaceable entry), § 11 (power of sale). But see 50 U.S.C. App. § 532(3) (Soldiers' and Sailors' Civil Relief Act of 1940). *Cf.* Uniform Commercial Code, § 9-503.

event, in *Miller Brothers Co.* v. *Maryland*, 347 U.S. 340, 347, 351, par. 6 (d) (1954), this Court held a state may not impose a tax merely on the basis of a security interest recorded in property which was sold in another state. *Cf.* Uniform Commercial Code, § 9-103(3). Finally, as noted by the court below, a franchise is uniquely incapable of taxation by another state. *First Federal Savings & Loan Assn.*, *supra*, 363 N.E. 2d at 481.

The principal thrust of the Commerce Clause is to protect interstate commerce from multiple taxation. In *General Motors Corp.* v. *Washington*, *supra*, the taxpayer produced specific evidence of duplicate taxation, but its claim still failed as "[General Motors] has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax." *Id.* at 449. *Accord*, *Northwestern States Portland Cement Co.*, *supra*; *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 295 (1944). In this case the associations offer only the possibility of multiple taxation as there has been no showing that other states impose taxes on them. In fact, for part of the period in issue, the State Taxation of Depositories Act, Pub. L. 93-100, § 7, 87 Stat. 342 (eff. Sept. 13, 1973), made it unlawful for states other than Massachusetts to tax the associations.

The Equal Protection Clause claim is not seriously advanced by the associations, nor could it be. No question of constitutionally impermissible classification is raised; the claim is solely inequality of treatment. The salient fact is that the state statute treats the federal associations and their state counterparts identically. If more were needed, the decision in *Lenhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973), demonstrates that the claim is plainly unsubstantial. *Lenhausen* held that a state could levy a personal property tax on businesses while excusing individuals

from a similar tax, because ". . . States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Id.* at 359. *Accord, Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527 (1959) (tax cannot be "palpably arbitrary"); *Madden* v. *Kentucky, supra*, at 87 ("broad discretion"). See *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (statute does not offend Equal Protection Clause if not drawn with "mathematical nicety or because in practice it results in some inequality"). The Massachusetts statute does not even approach these constitutional boundaries.

Finally, it should be noted that this case does not present an appropriate occasion for constitutional decision. The Congress has regulated state taxation in 12 U.S.C. § 1464(h), and the statute (no "greater" tax on "similar" institutions) covers the constitutional objections raised by the associations. *Cf. Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341, 347 (1936) (Brandeis, J., concurring). This Court has relied on Congressional enactments, rather than the Constitution, in prior cases involving state taxation of federal savings and loan associations, *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Comm'n, supra* (12 U.S.C. §§ 1433, 1464(h)), and of national banks, *Michigan National Bank* v. *Michigan, supra* (12 U.S.C. § 548). Similarly, this Court's decisions under the Commerce Clause and the Due Process Clause on the states' power to tax were rendered in the absence of direct Congressional regulation under Art. I, § 8, cl. 3, of the Constitution. *E.g., Complete Auto Transit, Inc.* v. *Brady, supra*; *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue, supra*; *National Bellas Hess, Inc.* v. *Illinois Dept. of Revenue, supra*. There is no reason to depart from this course of decision by giving plenary consideration to the present case.

IV. Reasons for Denying Plenary Consideration.

In recent years the Congress has commissioned two studies on state taxation of national banks and federal savings and loan associations.[20] Decision of the associations' appeal by this Court would have no precedential value as the case principally involves the application of settled interpretations of a federal statute to the facts and there are no conflicting decisions by lower courts. Thus, there is no reason for the Court to give plenary consideration to the appeal where Congress has ultimate authority under the Constitution and is considering further legislation.

The state court carefully considered all the issues raised by the associations, and its opinion is plainly correct on the record of this case. There are no significant federal interests at stake as the associations presently receive preferential treatment under the Massachusetts tax laws. The failure of the United States to join in the associations' challenge to Mass. Gen. Laws c. 63, § 11(a)(1), (b)(1), in the litigation it initiated before the federal courts is alone a significant indication that the claims presented by this appeal are not substantial.

---

[20] See Pub. L. 91-156, § 4, 83 Stat. 434 (Dec. 24, 1969), and Pub. L. 93-100, § 7(e), 87 Stat. 342 (Aug. 16, 1973). See also the amendments to 12 U.S.C. § 548 at note 10, *supra*, and the State Taxation of Depositories Act in Part III of the Argument. Pub. L. 94-222, § 1, 90 Stat. 197, extended the State Taxation of Depositories Act to September 12, 1976, as the report by the Advisory Commission on Intergovernmental Relations was not submitted until September 12, 1975. 1976 U.S. Code, Cong. & Admin. News 288.

Conclusion.

The appeal should be dismissed for lack of a substantial federal question. The Court should also dismiss the associations' claim that the state court erred in holding that Mass. Gen. Laws c. 63, § 11, is a franchise tax and that the statutory deduction for operating expenses excludes dividends paid by the associations on the ground that the judgment below rests on an adequate, non-federal ground.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
Commonwealth of Massachusetts,
JOHN E. BOWMAN, JR.,
Assistant Attorney General.

Date: October 21, 1977

Department of the Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1010

Supreme Court, U. S.
FILED
NOV 10 1977
MICHAEL RODAK, JR., CLERK

NOV 11 PAGE -1

Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL.,

APPELLANTS,

v.

STATE TAX COMMISSION, ET AL.,

APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief in Opposition to Motion to Dismiss.

CHESTER M. HOWE,
MAXWELL D. SOLET,
GASTON SNOW & ELY BARTLETT,
One Federal Street,
Boston, Massachusetts 02110.
(617) 426-4600
Attorneys for the Appellants.

ADDISON C. GETCHELL & SON, INC., THE LAWYERS' PRINTER, BOSTON

Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL.,
APPELLANTS,
v.
STATE TAX COMMISSION, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief in Opposition to Motion to Dismiss.

Appellants oppose Appellees' Motion to Dismiss the appeal in this case for the reasons stated below.

A. Discrimination.

The United States Court of Appeals for the First Circuit struck down the deposits element of the Massachusetts tax because it was deliberately discriminatory. The Massachusetts Supreme Judicial Court sustained the income-based portion of the tax, despite its finding of adverse discrimina-

tion against Federal associations on the grounds that Massachusetts was not the source of the discrimination and that a "substantial competitive disadvantage" had not been shown. Thus the existence of adverse discrimination against Federal associations has been found conclusively. The issue is whether the discrimination may be excused.

Massachusetts subtly seeks to avoid the issue by arguing that no factual discrimination exists. The argument is not only too late but also baseless. Omitted from Appellees' Brief is the fact that State cooperative banks received larger aggregate deductions for additions to reserves than did Federal associations in six out of the seven years following enactment of the statute in question (A. 229-231). State savings banks received larger aggregate deductions in four of the seven years and equal deductions in one year, as noted by Appellees. The argument that the record does not support the finding of discrimination is without merit. Therefore, the burden is on the Appellees to show that there is "just reason" for such discrimination and that it does not create "an unequal and unfriendly competition" with the Federal associations. *Michigan National Bank* v. *Michigan*, 365 U.S. 467, 473 (1961).

Massachusetts seems to argue that any differences in allowable deductions is justified since the deductible amounts represent restricted funds. Appellees state:

> The essential point, which is obscured by the associations' arguments, is that the guaranty fund is a portion of surplus which, by law, is not available either for distribution to the shareholders (depositors) or for investment.

Appellees' Brief at 16. That statement is wrong. The portion of surplus represented by the guaranty fund is fully available for investment. The only statutory limitation on

such a fund is that it may not be used for distributions to shareholders or depositors. M.G.L. c. 168, § 59 (defining "net income" available for dividends); M.G.L. c. 170, § 37 (describing procedure for distribution of "net profits"); 12 C.F.R. § 563.11(a) (prohibiting dividends or interest from insurance reserve account). In accounting terms, a guaranty fund constitutes a segregation of the surplus shown on the liabilities side of the balance sheet, but it has no effect on the mix of items shown on the assets side. In contrast, the liquidity reserve required of cooperative banks must be held in specific sorts of investments. M.G.L. c. 170, § 40.

Finally, Massachusetts argues that the discrimination contained in the income-based measure of the tax is purged of taint by the earlier holding of the Court of Appeals that the deposits portion of the tax is discriminatory and therefore invalid as to the Federal associations. This argument was not raised in the courts below. Further, there is no logic to preferring one discriminatory tax over the other. Surely, the discrimination inherent in the income-based portion of the tax is made no less offensive by the holding that the deposits tax enacted by the same statute is deliberately discriminatory rather than nondiscriminatory. The order in which the two elements of the tax are addressed by the courts cannot alter the validity of either.

B. Nomenclature.

In its discussion of the nature of the tax, Massachusetts again appears to alter the focus of the inquiry. The issue is not whether the tax can be nominally characterized as an income-based tax, as was done by the Court of Appeals or as a franchise tax, as was done by the Supreme Judicial Court. Either "label" satisfies 12 U.S.C. § 1464(h) on its face. The question, properly framed, is whether the statute

actually imposes an income tax or a franchise tax under Federal law. Can a tax which denies a deduction for the largest single annual expense—payments to depositors—while allowing a deduction for an element unrelated to income—additions to reserves—be defined as an income tax? Can a tax which fails to provide an apportionment mechanism, thereby giving no recognition to the fact that the depositors and sources of revenue of Federal associations may be substantially extraterritorial to Massachusetts, properly reflect the value of the exercise of the franchise in the state? Massachusetts does not address these questions.

C. Extraterritorial Income.

In *Brady* v. *John Hancock Mutual Life Insurance Company*, —— Miss. ——, 342 So. 2d 295 (1977), the Supreme Court of Mississippi held that that state had jurisdiction to tax interest income of a non-resident corporation based upon the fact that the loans in question were secured by real estate within the taxing state and the security interests were recorded there, even in cases in which the non-resident had purchased mortgage loans from independent contractors and had held and serviced them outside the state. This Court recently dismissed the appeal in the cited case. 46 U.S.L.W. 3187 (Dkt. No. 76-1688, October 3, 1977).

The Massachusetts Supreme Judicial Court acknowledged that the Federal associations invest a substantial portion of their funds in mortgage loans secured by non-Massachusetts real estate. Over $300,000,000 of revenues were received by the Federal associations from out-of-state sources through 1974 (A. 234). Federal associations border on all five neighboring states (A. 3-12), and all Federal associations have power to make direct mortgage loans outside Massachusetts. Detailed evidence as to the out-of-state

mortgage activity of each of the thirty-four Appellants is not necessary in a declaratory action such as this in which the liability of individual institutions is not in question.

Conclusion.

Appellees have not stated adequate reasons for dismissing the appeal in this case. The Federal questions presented are substantial, and the record is entirely sufficient.

Appellees' motion should be denied, probable jurisdiction should be noted, and the decision of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted,

CHESTER M. HOWE,
MAXWELL D. SOLET,
GASTON SNOW & ELY BARTLETT,
One Federal Street,
Boston, Massachusetts 02110.
(617) 426-4600
Attorneys for the Appellants.

Supreme Court, U. S.
FILED
JAN 5 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL.,
APPELLANTS,

v.

STATE TAX COMMISSION, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief for the Appellants.

CHESTER M. HOWE,
MAXWELL D. SOLET,
OLIVER W. STALTER,
GASTON SNOW & ELY BARTLETT,
One Federal Street,
Boston, Massachusetts 02110.
(617) 426-4600
Attorneys for the Appellants.

ADDISON C. GETCHELL & SON, INC., THE LAWYERS' PRINTER, BOSTON

Table of Contents.

Opinion below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Questions presented	5
Statement of the case	5
Summary of argument	11
Argument	20
A. The acknowledged discrimination against Federal Savings and Loan Associations may not be excused or justified	20
B. Massachusetts credit unions are mutual thrift and home financing institutions "similar" to Federal savings and loan associations	30
1. Standards of similarity	31
2. Statutory powers	35
3. Actual practices	39
C. Massachusetts G.L. c. 63, §11 does not impose a tax on an authorized subject of taxation under 12 U.S.C. §1464(h) and is defective in form	46
1. Franchise tax	49
2. Income tax	52
3. Reserve additions	58
4. Lack of comparable standards	60
D. The Massachusetts statute violates the Commerce Clause by its failure to provide for apportionment of income derived from other states	61

E. The Massachusetts statute violates the Due Process Clause by its failure to provide for apportionment of income derived from other states and by its use of separate and unequal standards for measuring deductions 70

F. The use of separate and unequal standards for measuring deductions violates the Equal Protection Clause 73

Conclusion 74

Table of Authorities Cited.

Cases.

Barnes v. State Tax Commission, 363 Mass. 589 (1973) 54

Bingham v. Commissioner of Corporations and Taxation, 249 Mass. 79 (1924) 54

Brady v. John Hancock Mutual Life Insurance Company, —— Miss. —— 342 So. 2d 295, —— U.S. ——, 98 S. Ct. 32 (1977) 66, 67

Butler Brothers v. McColgan, 315 U.S. 501 (1942) 72

Commissioner v. Meridian & Thirteenth Railroad Company, 132 F.2d 182 (7th Cir. 1942) 57

Commissioner of Corporations and Taxation v. Flaherty, 306 Mass. 461 (1940), cert. denied, 312 U.S. 680 (1941) 33-34, 42

Connecticut General Life Insurance Co. v. Johnson, 303 U.S. 77 (1938) 71

Consumer Savings Bank v. Commissioner of Banks, 361 Mass. 717 (1972) 27

Educational Films Corporation of America v. Ward, 282 U.S. 379 (1931) 49

Eisner v. Macomber, 252 U.S. 189 (1920) 52, 53

First Agricultural Bank v. State Tax Commission, 392 U.S. 339 (1968) 48

First Federal Savings and Loan Association of Boston v. State Tax Commission, Mass. Adv. Sh. (1977) 895, 363 N.E. 2d 474 1, 7, 9, 10, 11, 21, 22, 23, 26, 27, 29, 30, 31, 38, 40, 41, 49, 51, 52, 55, 56, 58, 60, 69, 73

First Federal Savings & Loan Association of New Haven v. Connelly, 142 Conn. 483 (1955), cert. denied, 350 U.S. 927 (1956) 43

First National Bank of Hartford, Wisconsin v. City of Hartford, 273 U.S. 548 (1927) 39, 41-42

Freeman v. Hewitt, 329 U.S. 249 (1946) 63, 65, 66, 67

General Motors Corp. v. Washington, 377 U.S. 436 (1964) 64, 65

Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939) 19, 62, 65

Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931) 19, 71

Hormel v. Helvering, 312 U.S. 552 (1941) 29

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 73

J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307 (1938) 62

John Kelley Co. v. Commissioner, 326 U.S. 521 (1945) 55

Laurens Federal Savings & Loan Association v. South Carolina Tax Commission, 365 U.S. 517 (1961) 12, 16, 22, 25, 45, 60

Macallen Co. v. Massachusetts, 279 U.S. 620 (1929) 49
Manchester Federal Savings and Loan Association v. State Tax Commission, 105 N.H. 17 (1963) 44
McCulloch v. Maryland, 4 Wheat. 316 (1819) 46
McLaughlin v. Florida, 379 U.S. 184 (1964) 74
McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944) 61-62
Mercantile Bank of New York, 121 U.S. 138 (1887) 15, 31, 32
Michigan National Bank v. Michigan, 365 U.S. 467 (1961) 13, 25, 32, 34, 36, 48
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) 62
Minnesota v. First National Bank of St. Paul, 273 U.S. 561 (1927) 42
Morrissey v. Commissioner, 296 U.S. 344 (1935) 15, 31, 33, 34
Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 64
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 64
O. H. Kruse Grain & Milling v. Commissioner, 279 F.2d 123 (9th Cir. 1960) 55
Opinion of the Justices, 46 Mass. (5 Met.) 596 (1844) 54
Osborn v. Bank of the United States, 9 Wheat. 738 (1824) 46
Owensboro National Bank v. Owensboro, 173 U.S. 664 (1899) 46
Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania, 125 U.S. 181 (1888) 70
Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252 (1919) 62

Provident Institution v. Massachusetts, 6 Wall 611 (1867) 49
Singleton v. Wulff, 428 U.S. 106 (1976) 29
Sneed v. Shaffer Oil & Refining Co., 35 F.2d 21 (8th Cir. 1929) 61
Springfield Institution for Savings v. Worcester Federal Savings and Loan Association, 329 Mass. 184, cert. denied, 344 U.S. 884 (1952) 34, 42
State v. Minnesota Federal Savings & Loan Association, 218 Minn. 229 (1944) 43, 44, 45
State Tax Commission v. John H. Breck, Inc., 336 Mass. 277 (1957) 17, 51
Underwood Typewriter Company v. Chamberlain, 254 U.S. 113 (1920) 19, 71, 72
United States v. State Tax Commission, 348 F. Supp. 397 (D. Mass. 1972) 8, 30
United States v. State Tax Commission, 481 F.2d 963 (1st Cir. 1973) 1, 6, 8, 23, 30, 46, 62-63, 73
Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) 62

CONSTITUTIONAL PROVISIONS.

United States Constitution
Article I, Section 8 2, 5, 18, 61, 65
Amendment XIV 2, 5, 19, 34, 44, 45, 70, 71, 72, 73
Amendment XVI 52

STATUTES.

12 U.S.C.
§548 12, 25, 32, 33, 34, 39, 45, 48

§§1421-1429 6
§1425a(b) 38
§1425b(a) 27, 56
§§1461-1468 6
§1464(a) 13, 39
§1464(c) 38, 70
§1464(h) 2, 5, 6, 8, 9, 10, 12, 14, 16, 17, 20, 21, 22, 24, 25, 26, 30, 32, 34, 35, 39, 44, 45, 46, 47, 48, 52, 55, 58, 59, 60, 61, 73
§§1724-1730C 6
§1725(a) 7
§1726(b) 7, 21
§1728(a) 37
§1757(5) 35
§1759 35
§1781(a) 37
§1828 26
§1832 27
26 U.S.C.
§163 58
§591 58
28 U.S.C. §1257(2) 2
P.L. 93-100, §2, 87 Stat. 342 (1973), 12 U.S.C. §1832 27
P.L. 93-100, §7, 87 Stat. 347 (1973) 67
P.L. 94-222, §1, 90 Stat. 197 (1976) 68
Emergency Home Finance Act of 1970, 84 Stat. 463 25
Home Owners' Loan Act of 1933, 48 Stat. 132, Section 5(h), as amended by 53 Stat. 1402 (1939), 65 Stat. 490 (1951), and 76 Stat. 984 (1962) see 12 U.S.C. §1464(h)

Internal Revenue Code, 26 U.S.C. 15, 55
State Taxation of Depositories Act, P.L. 93-100, §7, 87 State. 347 (1973), P.L. 94-222, §1, 90 Stat. 197 (1976) 18, 67, 68
Mass. G.L. c. 63
§11 3-4, 6, 8, 9, 17, 20, 29, 46, 47, 48, 49, 52, 54, 58, 60, 61, 69, 70, 73
§18A 8
§20 51
§23 51
§38 50
§51 8
§52A(2) 51
Mass. G.L. c. 167
§16A 27
§18B(2) 26
Mass. G.L. c. 168
§58(1) 7, 20
Mass. G.L. c. 170
§38 7, 20, 59
Mass. G.L. c. 171
§2 13, 39
§5 37
§10 36, 37
§13 36
§24 36, 38
§24(A) 15, 35
§24(B) 35, 38
§25 37
§35 37

Acts 1977
c. 16-18 37
c. 22 38

REGULATIONS.

12 C.F.R. §523.11 38
12 C.F.R. §526.3 37
12 C.F.R. §545.6 38
12 C.F.R. §554.1 36
12 C.F.R. §563.13(a)(1) 7, 20
16 Fed. Reg. 1818 (1951) 24
21 Fed. Reg. 5483 (1956) 24
29 Fed. Reg. 7090 (1964) 24
35 Fed. Reg. 12388 (1970) 27
Regulation of the Commissioner of Banks, July 31, 1970 27

MISCELLANEOUS.

Accounting Research Bulletin No. 43, Ch. 8, ¶12 59
American Institute of Certified Public Accountants, Audits of Savings and Loan Associations 57
Annual Report of the Massachusetts Commissioner of Banks for 1973, Section B 40
B. Bittker and L. Stone, Federal Income Estate and Gift Taxation 39 (1972) 53
Boston Sunday Globe, June 6, 1976 34-35
Hearings on S. 1900 (Senate Report not yet published), Nov. 22, 1977 68
Statement of R. James Alerding 68

Statement of C. James Judson 68
National Credit Union Administration, 1973 Annual Report, "State-Chartered Credit Unions" 43
5 Opinions of the Attorney General of the Commonwealth of Massachusetts 269 (1918) 37
S. 1900, 95 Cong., 1st Sess. (1977) 68
S. Rep. 781, 82d Cong., 1st Sess. 25-26 (1951) 58
Seligman, Income Tax, 7 Encyclopedia of the Social Sciences 628 (1932) 53
K. Solomon, Lawyer's Handbook of Accounting Theory and Practice 8 (1971) 53-54
Webster's Seventh New Collegiate Dictionary 424 (1970) 53

Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL.,

APPELLANTS,

v.

STATE TAX COMMISSION, ET AL.,

APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief for the Appellants.

Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported at Mass. Adv. Sh. (1977) 895 and at 363 N.E. 2d 474 and is reproduced as Appendix A to the Jurisdictional Statement, which also includes, for convenience, the opinion in *United States* v. *State Tax Commission*, 481 F.2d 963 (1st Cir. 1973), as Appendix E.

Jurisdiction.

The judgment of the Supreme Judicial Court was entered May 3, 1977. On July 22, 1977, by order of Mr. Justice Brennan, the time within which to docket an appeal was extended to August 31, 1977. The appeal was docketed on August 31, 1977. This Court noted probable jurisdiction on November 14, 1977. The jurisdiction of this Court rests on 28 U.S.C. §1257(2).

Constitutional and Statutory Provisions Involved.

Article I, Section 8 of the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

Amendment XIV to the United States Constitution provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5(h) of the Home Owners' Loan Act of 1933, 48 Stat. 132, as amended by 53 Stat. 1402 (1939), 65 Stat. 490 (1951), and 76 Stat. 984 (1962), 12 U.S.C. §1464(h) provides:

> No State, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

Chapter 63, Section 11 of the Massachusetts General Laws, as amended, provides:

> Every savings bank as defined in chapter one hundred and sixty-eight, every co-operative bank as defined in chapter one hundred and seventy and every state or federal savings and loan association located in the commonwealth shall pay to the commissioner an annual excise equal to the following:
>
> (a) on or before the twenty-fifth day of the seventh month of the taxable year, there shall be paid (1) six hundred twenty-seven one thousandths per cent of a reasonable estimate of its net operating income, as hereinafter defined, for the taxable year, and (2) one-sixteenth of one percent of the average amount of its deposits or of its savings accounts and share capital for the first six months of the taxable year, after deducting from such average amounts (i) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (ii) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by this commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of this commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of such sixth-month period; and
>
> (b) on or before the twenty-fifth day of the first month following the close of the taxable year, there shall be paid (1) one and two hundred fifty-four one

thousandths per cent of its net operating income, as hereinafter defined, for the taxable year, less the estimated amount previously paid with respect to such income, and (2) one-sixteenth of one per cent of the average amounts of its deposits or of its savings accounts and share capital for the second six months of the taxable year, after deducting from such average amount (i) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (ii) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by this commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of this commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of the taxable year.

For the purpose of this section, "net operating income" shall mean gross income from all sources, without exclusion, for the taxable year, less (i) operating expenses, (ii) net losses upon assets sold, exchanged or charged off as uncollectible during the taxable year, and (iii) minimum additions during the taxable years to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities; and "taxable year" shall mean any fiscal or calendar year or period for which the bank is required to make a return to the federal government. Federal and state taxes paid or accrued during the taxable year shall not be deductible in computing "net operating income."

Questions Presented.

1. Does 12 U.S.C. §1464(h) prohibit the acknowledged discrimination in favor of Massachusetts-chartered institutions which results from the allowance of deductions for minimum required additions to guaranty fund or surplus?

2. Are Massachusetts credit unions, which are conceded to be "local mutual or cooperative thrift and home financing institutions," "similar" to Federal savings and loan associations under 12 U.S.C. §1464(h)?

3. Is the Massachusetts tax on Federal savings and loan associations restricted to the form of taxation and subjects of tax enumerated in 12 U.S.C. §1464(h)?

4. Does the Massachusetts statute violate the Commerce Clause of the United States Constitution by its failure to provide for apportionment of income to other states?

5. Does the failure to provide for apportionment of income derived from other states or the use of separate and unequal standards for measuring deductions violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

6. Does the use of separate and unequal standards for measuring deductions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

The Appellants (hereinafter sometimes referred to as "the Associations") constitute all of the Federally-chartered savings and loan associations located within the Commonwealth of Massachusetts. Appendix (hereinafter

"A.") at 11. All were chartered pursuant to 12 U.S.C. §§1461-1468, all are members of the Federal Home Loan Bank System pursuant to 12 U.S.C. §§1421-1429, and all are insured by the Federal Savings and Loan Insurance Corporation pursuant to 12 U.S.C. §§1724-1730C. *Id.*

In the Home Owners' Loan Act of 1933, Congress authorized the states to impose certain taxes on Federal associations, provided that such taxes are no greater than those imposed on "similar" state-chartered institutions. 12 U.S.C. §1464(h).

In 1966, Massachusetts enacted Section 11 of Chapter 63 of the Massachusetts General Laws, imposing an excise tax on all Federal savings and loan associations located in the Commonwealth and on State-chartered savings banks and cooperative banks. The tax was imposed on "net operating income" (§§11(a)(1) and 11(b)(1)) and, nominally, on deposits (§§11(a)(2)and 11(b)(2)). In general, the deposits element of the tax allows a deduction for loans secured by real estate in Massachusetts but not for most non-Massachusetts real estate. The deposits element of the tax was struck down by the Court of Appeals as deliberately discriminatory to Federal associations. *United States* v. *State Tax Commission*, 481 F.2d 963 (1st Cir. 1973).

The critical facts concerning the income-based portion of the statute, which is the portion here challenged, are the following: (1) in arriving at "net operating income," a deduction from gross income is allowed for minimum additions to a guaranty fund or surplus required by statute or by State or Federal regulatory authorities, (2) while a deduction is provided for "operating expenses," the State Tax Commission and the Massachusetts Supreme Judicial Court have construed that term as not covering dividend or interest payments to depositors, (3) there is no provision

for apportionment or allocation to limit the tax to business activities in Massachusetts, and (4) the tax does not apply to Massachusetts credit unions.

A Massachusetts cooperative bank must set aside into a guaranty fund 10% of its assets at the rate of 5% of net profits per year. Mass. G.L. c. 170, §38. A Massachusetts savings bank must set aside 7½% of deposits at the rate of ⅛ to ¼ of 1% of total deposits for each six-month dividend period or a proportional amount thereof if a shorter dividend period is used. Mass. G.L. c. 168, §58(1). By contrast, Federal associations are required to set aside only 5% of insured accounts, which requirement must be met within twenty years or, if mortgage needs so require, within thirty years. 12 U.S.C. §1726(b). The rate of additions is determined by the Federal Savings and Loan Insurance Corporation, which is subject to the Federal Home Loan Bank Board. 12 U.S.C. §§1725(a) and 1726(b). The annual addition to reserves is currently required to be the amount necessary to bring such reserves to a level which increases by ¼ of 1% each year until reaching 5% of insured accounts and which remains constant thereafter. 12 C.F.R. §563.13(a)(1).

The Massachusetts Supreme Judicial Court found that the tax effect of the resulting differences in required additions to reserves was adversely discriminatory to the Federal associations. Mass. Adv. Sh. (1977) 895, 909, 363 N.E. 2d 474, 484.

All of the Associations are located within 100 miles of another state, and at least one is located in a city on the border of Connecticut, Maine, New Hampshire, New York and Rhode Island. See Appendix prepared for Supreme Judicial Court (hereinafter "SJC App.") at 3-12. The Associations derive substantial income from mortgage

loans with respect to real estate outside Massachusetts. A. 134.

Massachusetts-chartered credit unions have statutory power to make real estate loans on substantially the same terms and to substantially the same extent as Federal associations, as discussed *infra* at 37-38, and, in 1973, twenty Massachusetts credit unions had over fifty percent of their total assets invested in real estate loans. A. 146.

The Associations paid the taxes imposed by c. 63, §11, but for various assessment periods some or all of them protested the assessment of the tax and filed applications for abatement in accordance with Mass. G.L. c. 63, §§18A and 51. A. 12-13.

After denial of the applications for abatement, the United States challenged the deposits element of the tax on several statutory and State and Federal constitutional grounds by seeking declaratory relief in the Federal District Court for the District of Massachusetts. The District Court held the deposits element of the tax to be in violation of 12 U.S.C. §1464(h) and the Supremacy Clause. *United States* v. *State Tax Commission*, 348 F. Supp. 397, 400 (D. Mass. 1972). The Court of Appeals affirmed the holding on the exclusive ground that the tax was discriminatory in violation of 12 U.S.C. §1464(h). *United States* v. *State Tax Commission*, 481 F.2d 963, 970 (1st Cir. 1973).

Some of the Associations intervened in the Federal court litigation in order to challenge the net operating income portion of the tax, but the Court of Appeals exercised its discretionary power to withhold relief without consideration of the merits, since it found that an adequate remedy existed in the State courts. 481 F.2d at 971-976.

On April 16, 1975, the Associations commenced an action for declaratory relief in the Suffolk (County) Superior

Court. On December 24, 1975, the parties filed a Stipulation of Facts and motions for summary judgment. Prior to a decision on such motions, at the request of the parties, the case was reported without decision to the Appeals Court. On April 15, 1976, the Supreme Judicial Court for the Commonwealth of Massachusetts granted the Associations' motion for direct appellate review. On May 3, 1977, after briefs and oral argument, the Supreme Judicial Court issued a decision rejecting all of the Associations' State and Federal statutory and constitutional challenges to Mass. G.L. c. 63, §11. A. 3-5.

With respect to the argument that the Massachusetts statute discriminated against Federal associations, in violation of 12 U.S.C. §1464(h), because of differences in required additions to reserves, the Court stated:

> We think that the purpose of §1464(h) is not frustrated by the circumstance that reserve or guaranty fund requirements differ. The cause of the discrimination is the lower requirements imposed by the Federal regulatory agency on Federal savings and loan associations. The Commonwealth is not the source of the discrimination. The excise statute is wholly neutral.

Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482.

As to the argument that the tax was not one of those authorized in the Federal statute, the Court responded by characterizing the tax as a "franchise" tax and, in the alternative, as an "income" tax. Mass. Adv. Sh. (1977) at 904-905, 363 N.E. 2d at 480-481.

With respect to the argument that Massachusetts-chartered credit unions are "similar" institutions under 12 U.S.C. §1464(h), the Court stated:

> The test for similarity [of credit unions and Federal savings and loan associations] is not what each type

> of institution might do but rather what each does in fact . . . . The proper method of measuring similarity may be a collective, rather than an individual, comparison.

Id. at 913-914, 363 N.E. 2d at 484. Despite its finding that approximately 42% of all credit union loans were in real estate mortgages, the Court found a failure of proof that "... credit unions compete substantially . . . for the same types of investors and the same class of borrowers." *Id.* at 914, 363 N.E. 2d at 484. Hence it held that failure to tax credit unions did not lead to discrimination against Federal savings and loan associations in violation of 12 U.S.C. §1464(h).

With respect to the Commerce Clause issue, the Court stated:

> The record shows that collectively the associations invest a substantial portion of their funds (about 29% in 1974) in mortgage loans secured by real estate located in other States. The record does not show the extent of the contacts of any association with any other State nor does it show whether, in the circumstances of its business operations, any other State does or could impose a tax or excise on any association. Of course, no other State could impose an excise on an association's privilege to do business in Massachusetts . . . . Even if we assume, as the associations argue, that the issue of burdening interstate commerce turns on what other States may do, and not what they do in fact, the associations have not met their burden of establishing that §11 improperly imposes on interstate commerce. The tax is not invalid per se and, on this record, we cannot determine that it is forbidden by the commerce clause. The record is devoid of any

> information with respect to the contacts and activities of any individual Federal savings and loan association in any other jurisdiction.

Id. at 907-908, 363 N.E. 2d at 481 (citations omitted).

Finally, as to the Due Process and Equal Protection arguments, the Supreme Judicial Court stated:

> There is no fundamental unfairness in the due process sense. Every institution is placed in the same classification for tax purposes, but, even if we were to accept the assertion that the associations are placed in a separate class (because of the action of an agency of the Federal government), such a classification would not be impermissible. Legislative classifications for tax purposes are given wide respect in the face of constitutional challenges.

Id. at 910, 363 N.E. 2d at 482-483 (citations omitted).

Summary of Argument.

The deliberately complex Massachusetts statute taxing Federal savings and loan associations raises a comprehensive group of interpretive issues of first impression. Resolution of all issues presented would go far in shaping the permissible bases of taxation of Federal associations in all fifty states. Consequently, the opinion of this Court is likely to have a significant impact on both the operations of Federal associations and the cost of home financing.

Discrimination. The finding by the Massachusetts Supreme Judicial Court that discrimination adverse to Federal associations exists is not subject to serious challenge. The factual proof of discrimination is compelling. That finding of discrimination should, by itself, be sufficient to

cause the statute to fail. No erosion should be permitted of the view expressed by this Court in *Laurens Federal Savings & Loan Association* v. *South Carolina Tax Commission*, 365 U.S. 517 (1961), that 12 U.S.C. §1464(h) "unequivocally bars discriminatory state taxation of Federal Savings and Loan Associations."

The Massachusetts Court attempted to excuse this discrimination by stating that the source of the discrimination was Federal, since a Federal agency established the reserve requirement which governed the amount of the deduction in question. However, the source of discrimination is irrelevant under the statute. Further, it is the Massachusetts statute, not the Federal agency, which imposes the tax. Finally, the Federal agency could not eliminate the discrimination if it wished. Even if it could, to do so would be to forego regulatory powers intended to further national housing policies.

In addition, the Massachusetts Court implicitly held that a perceived competitive advantage in favor of Federal associations would justify offsetting tax discrimination against them. The Court then proceeded to burden Federal associations with the task of proving an overall competitive disadvantage in order to invalidate the tax.

The burden is inappropriate for several reasons. First, §1464(h) deals only with "similar" institutions. By definition, therefore, relative competitive standing has been substantially neutralized. This requirement of "similarity" contrasts with 12 U.S.C. §548, which requires parity of state tax treatment between national banks and any "moneyed capital . . . coming into competition" with them. Moneyed capital exists in many forms some of which are not employed in any phase of the business of banking. Even under §548 no balancing of competitive advantage by offsetting tax treatment is permitted. Tax parity is required if competition exists. Similarity assures competition.

Second, the very finding of adverse tax discrimination necessarily shows "an unequal and unfriendly competition" in which local institutions are favored. *Michigan National Bank* v. *Michigan*, 365 U.S. 467, 473 (1961). The finding of the Massachusetts Supreme Judicial Court is dispositive.

Third, even assuming that relative competitive standing might excuse a discriminatory tax, the state, rather than Federal savings and loan associations, must bear the burden of establishing the absence of hostile competition. The Massachusetts State Tax Commission has not attempted to establish the fact, and it cannot.

Finally, the Massachusetts Court's suggestion that lower reserve requirements give Federal associations a competitive advantage is itself erroneous. No facts exist to support it. Reserve requirements do not, in practice, have a substantial effect on capacity to pay dividends. Thus, there is no competitive advantage to neutralize discriminatory taxation.

"Similar" Credit Unions. "Similarity" of thrift institutions under the Federal statute ought properly to be judged on the basis of statutory purposes and powers. Competition is a necessary concomitant of similarity. The purposes of Massachusetts credit unions encompass and exceed the purposes of Federal associations. By statute, both are local thrift institutions which, in the case of credit unions, may make "loans . . . for provident purposes," Mass. G.L. c. 171, §2, while Federal associations accumulate primarily "to provide for the financing of homes." 12 U.S.C. §1464 (a). The latter purpose is clearly "provident" and included within the credit union purposes. As such Massachusetts credit unions have the larger scope and competitive impact.

The ability to make loans for other provident purposes provides a significant competitive edge to credit unions. A Massachusetts credit union can provide not only mortgage financing to purchase a home, it can provide credit for the car and furnishings needed to get to and enjoy the home. Credit unions can charge high consumer interest rates, 18% per year, and pay high interest to depositors, 8%. The advantages to either a depositing or borrowing "member" are considerably more attractive than those provided by Federal associations which are generally limited to a 5.25% dividend and individual home financing loans. The powers and purposes of the Massachusetts credit unions are similar to, and bring them into clear competition with, Federal associations.

Of the several other state courts which have considered the question of "similarity" between local credit unions and Federal associations, all have applied a standard of comparison that is identical to the standard under the Equal Protection Clause of the United States Constitution. As a result, minimal differences in powers or operations have been the basis for justifying discriminatory taxation. Moreover, and more important, the statutory standard of similarity established by §1464(h) has been merged into the equal protection standard by the state courts, and the statutory standard has become a redundancy, without independent effect. The approach is clearly erroneous.

Standards of "similarity" of thrift institutions under Federal law have not been established by this Court. However, in cases under the act authorizing taxation by states of national banks and cases under the Internal Revenue Code, substantial, if not exclusive, emphasis has been placed upon the powers available to the institution or entity, rather than the extent of their use, in judging the character of an entity.

In the national bank cases, the powers of the institution under consideration were largely the basis for judging its character. For example, in *Mercantile Bank* v. *New York*, 121 U.S. 138 (1887), "habitually exercised" powers were the basis for excluding trust companies from the definition of "banks," and savings banks were described as places for the "accumulation of small savings belonging to the industrious and thrifty." The 1935 decision by this Court in *Morrissey* v. *Commissioner*, 296 U.S. 344, remains the leading case for classification of business associations as corporations, partnerships or trusts under the Internal Revenue Code. There, the exclusive basis for judging the character of the entity was its powers since the full powers might be used at any time.

The powers and limitations of large Massachusetts credit unions and Federal associations are almost identical. Where differences exist the advantage is usually with the credit unions. The Massachusetts Court may have been prompted to conclude as it did out of concern for credit unions with small asset accumulations. Credit unions with less than $100,000 of assets are contemplated by the Massachusetts statute. Mass. G.L. c. 171, §24(A)6. It may be the small sized credit union that fosters the not uncommon notion of limited membership and limited resources for credit unions. However, large credit unions hold expanded powers comparable to Federal associations, and the statistical facts establish large credit unions as factual competitors with Federal associations. Twenty of the larger credit unions in the Commonwealth had over 50% of their assets in real estate loans. Total assets committed by the twenty credit unions to real estate loans in 1973 exceeded $170,000,000, a not insubstantial amount. It is not necessary to decide whether exemption on the basis of size would be justified

for the majority of credit unions. It is sufficent to recognize that twenty of the larger Massachusetts credit unions were in competition with the thirty-four Federal savings and loan associations to a substantial degree.

Massachusetts credit unions ought to be held to be "similar" institutions within the purview of §1464(h).

Limitations on Subjects and Form of Taxation. The states may tax Federal instrumentalities only to the extent authorized by Congress. Section 1464(h) limits the authority of the states to tax Federal associations to those subjects of taxation set out in the statute. Additionally, the section requires the imposition of a tax on identical subjects for both Federal and state institutions. For example, if a tax is imposed upon the capital of a Federal association, a no less burdensome tax must be placed upon the capital of its state counterparts.

Nor should §1464(h) be construed to permit to be done indirectly that which cannot be done directly. Massachusetts should not be permitted to "label" the tax as a franchise tax and measure the value of the Federal franchise largely by income, while measuring the value of State charters by a combination of income and deposits, which is the practical effect of the statute.

Valid comparisons simply cannot be made unless the objects to be compared are alike. The necessity for direct comparison flows from both the Federal statutory language and a decision of this Court. The approximate parity of taxation permitted in the taxation of national banks and other moneyed capital does not satisfy the "unequivocal" prohibition of discriminatory state taxation of Federal savings and loan associations set out by this Court in the *Laurens* case.

The Massachusetts Supreme Judicial Court failed to address directly the issues of the limitations of form and

subjects of taxation imposed by §1464(h) except in result. The Court characterized the §11 tax as a franchise tax measured by "deposits" and "income." The characterization is erroneous for three reasons.

First, other than nominally, deposits are no measure of the tax since a deduction from deposits is allowed for the value of real estate mortgage loans and banking facilities, which generally exceeded 70% of deposits for savings banks and 83% of deposits for cooperative banks. A. 135-144. While total deposits are an appropriate measure of the value of a franchise, that small portion of deposits allocated to out-of-state mortgage loans, intangible investments and personal loans (the real objects of tax here) does not appear to be an accurate measure of the value of the franchise.

Second, the so-called "net operating income" measure of the tax permits no deduction for the largest single cost of operation — payments to depositors — and injects a deduction unrelated to income—mandated additions to guaranty funds or surplus. Both are contrary to the treatment for Federal income tax purposes and other definitions of income. While an income measure is also an approved standard for valuing a franchise, income in name alone is not an acceptable standard.

Third, Federal associations are intended to function nationally, and a substantial portion (approximately 35%) of their income is extraterritorial to Massachusetts. A. 134. Yet §11 contains no provision for apportionment of income outside Massachusetts, despite the requirement that a franchise tax fairly reflect only the annual benefit provided by the taxing state for the exercise of corporate privileges under Massachusetts law. *State Tax Commission* v. *John H. Breck, Inc.*, 336 Mass. 277 (1957). Again, while the value

of a franchise may be measured by income, such income must be apportioned to include only that which results from exercise of the franchise in the taxing state.

Finally, the income-based portion of the tax fails to satisfy the other enumerated bases of taxation as well. Despite the alternative holding of the Massachusetts Court, the fact that, as indicated above, the definition of "net operating income" permits no deduction for the largest single cost of operation and injects a deduction unrelated to income precludes characterization as a tax on "income," as that term is understood for Federal income tax, accounting, and economic purposes or in everyday usage.

The Massachusetts statute defies proper characterization, in part, because of the divergence between nominal and real objects of taxation. However described, it is, in design and operation, outside the scope of permitted state taxation of Federal savings and loan associations as to both form and substance.

Commerce Clause. The tax in question makes no provision for apportionment of income among the states. The Associations derive significant amounts of income from mortgage loans secured by non-Massachusetts real estate. These loans commit them on a long-term basis to maintaining contacts with other states sufficient to support the imposition of taxes by such states. Since the unapportioned Massachusetts tax reaches every dollar of the Associations' income, including income from out-of-state loans, any tax by another state would constitute multiple taxation. Congress has been and is concerned with the threat of multiple state taxation of financial institutions including Federal savings and loan associations. Hearings are now in progress on the subject, and Congress temporarily prohibited such taxation by the State Taxation of Depositories Act.

The real and substantial risk of multiple taxation by itself impedes the free flow of funds among the states and thus burdens interstate commerce in violation of the Commerce Clause. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434 (1939).

Due Process Clause. The failure of the Massachusetts tax statute to provide some means of apportionment of income among the states also violates the Due Process Clause, which prohibits the states from taxing income not attributable to transactions within its jurisdiction. *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123 (1931). Where a transaction involves more than one state, apportionment is required. *Underwood Typewriter Company* v. *Chamberlain*, 254 U.S. 113 (1920).

In addition, the statute's use of different methods for computing the deduction for required reserve additions results in an unreasonable and arbitrary discrimination against Federal associations in violation of the Due Process Clause. The reserve requirements imposed on Federal associations by Federal statute and regulation have consistently resulted in lower deductions for them than for the admittedly similar Massachusetts-chartered thrift institutions, which are subject to higher reserve requirements imposed by Massachusetts statutes.

Equal Protection Clause. The use of different methods of computing the deduction for reserve additions also violates the Equal Protection Clause. Though Federal associations and State-chartered cooperative and savings banks have been held to be similar, the deduction is measured for the former by Federal reserve requirements and for the latter by higher Massachusetts requirements. This results in a greater tax burden on Federal associations, denying them the equal protection of the laws.

Argument.

A. The Acknowledged Discrimination Against Federal Savings and Loan Associations may Not Be Excused or Justified.

The Massachusetts Supreme Judicial Court found that Federal associations are objects of discriminatory taxation as a result of the deductibility from taxable income of mandatory additions to an institution's guaranty fund or surplus. The issue presented is whether such discrimination has been excused or justified in order not to offend the requirement of 12 U.S.C. §1464(h) that no greater tax be imposed on Federal savings and loan associations than is imposed on similar local institutions.

Mechanically, the Massachusetts statute authorizes a deduction from "net operating income" for "minimum additions . . . to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities." Mass. G.L. c. 63, §11. As a result, a Massachusetts cooperative bank is allowed an annual deduction equal to 5% of net profits until a guaranty fund equal to 10% of assets is accumulated. Mass. G.L. c. 170, §38. A Massachusetts savings bank is allowed an annual deduction equal to ¼ of 1% of total deposits until a guaranty fund equal to 7½% of deposits is accumulated. Mass. G.L. c. 168, §58(1).

Federal savings and loan associations currently are required to reserve only 5% of checking and savings account balances, to be accumulated at the rate necessary to increase reserves by ¼ of 1% of such balances each year for 20 years. 12 C.F.R. §563.13(a)(1). The Federal Savings and Loan Insurance Corporation may vary this schedule by regulation so long as the 5% level is reached within twenty years or, in the case of an individual institution, may extend the period by as much as ten additional years in the case of an individual institution if such action is determined to be necessary to meet mortgage needs. 12 U.S.C. §1726(b).

The above differences in the rates of additions to reserves and in ultimate reserve requirements have resulted in larger deductions and lower taxes for Massachusetts-chartered institutions in comparison to Federal savings and loan associations. The Supreme Judicial Court acknowledged the existence of this adverse discriminatory treatment of Federal associations in the following terms:

> . . . we accept the [Federal] associations' assertion that, generally, the required contributions of a Federal savings and loan association to its surplus are less than those of similarly situated Massachusetts savings and cooperative banks.

Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482. However, the Court held that such discrimination did not violate 12 U.S.C. §1464(h) for two reasons.

First, according to the Court, the discrimination was excused because

> The cause of the discrimination is the lower requirements imposed by the Federal regulatory agency on Federal savings and loan associations. The Commonwealth is not the source of the discrimination. The excise statute is wholly neutral.

Id. The source of discrimination cannot be relevant in view of the absolute prohibition by §1464(h) of discriminatory taxation of Federal associations. In any event, the Commonwealth is the source of the discrimination here since the tax is imposed under Massachusetts law, not Federal law.

Second, according to the Massachusetts Court,

> The operation of §11 in conjunction with the less strict reserve requirements applicable to Federal savings and loan associations has not been shown to present a substantial competitive disadvantage. Because of lower reserve requirements, Federal associations tend to have more funds available for immediate distribution to members than similarly situated State institutions.

Id. The Associations submit that (a) there is no support for the imposition of the "substantial competitive disadvantage" standard applied by the Court, (b) if discrimination may be justified, the burden of justification falls upon the State, and (c) the supposed increased dividend capacity of Federal associations relied upon as an offsetting advantage for such associations is pure speculation without factual support in the record and contrary to fact.

The source of adverse discriminatory tax treatment is an irrelevant inquiry. The plain wording of 12 U.S.C. §1464(h) is that no tax may be imposed on Federal associations "greater than" is imposed on local institutions. This Court, in its only interpretation of that provision, has stated that §1464(h) ". . . unequivocally bars discriminatory state taxation of the Federal Savings and Loan Associations." *Laurens Federal Savings and Loan Association* v. *South Carolina Tax Commission,* 365 U.S. 517, 523 (1961). It having been established that the tax on Federal associations is greater, the Massachusetts statute must fall.

Further, the Court's conclusion that the Federal government is the source of the discrimination is simply wrong. The Federal statute imposes no tax; only the Massachusetts statute does that. While it may be true

that "Congress must have recognized that reserve requirements would differ between Federal savings and loan associations and State savings institutions." Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482, Congress certainly cannot be deemed to have authorized the states to make such a difference the basis for imposition of unequal tax burdens in the face of the clear Federal prohibition of discrimination.

Moreover, a review of the history of the deduction for additions to reserves supports the view that deliberately discriminatory treatment of Federal associations was intended, parallel to that involved in the tax on out-of-state loans, nominally imposed on deposits, §§11(a)(2)(ii) and (b)(2)(ii) of Mass. G.L. c. 63, which was condemned by the Court of Appeals in *United States* v. *State Tax Commission,* 481 F.2d 963 (1st Cir. 1973). The amount of reserves, and rates of additions to reserves, required for Massachusetts cooperative and savings banks were fixed by statute prior to the 1966 enactment of §11, as was the amount of the reserve requirement for Federal associations. There is no reason to believe that the legislature acted out of ignorance rather than with knowledge of the effect of its own enactments. The legislature must have known the rates of addition and ultimate amounts of the reserves required. It is more probable that the legislature deliberately attempted to provide tax reductions for local institutions either as a distinct benefit or as an offset to perceived competitive disadvantages which local institutions might incur. As the Court of Appeals said:

> Federal associations are entitled not to be singled out for special tax burdens; and it makes no difference whether the latter are expressly written into the statute or are tailored, as here, more subtly.

481 F.2d at 970.

Even if the Federal agency responsible for establishing the rate of reserve additions by Federal associations were to act so as to minimize Massachusetts taxes, it could not eliminate the discriminatory result. The Massachusetts Court has suggested that the Federal Savings and Loan Insurance Corporation could, by accelerating the rate of required contributions to reserves by Federal associations, reduce, eliminate or reverse the discriminatory tax result, and that its failure to do so made it the source of the discrimination. It is true that if the ultimate reserve requirement for Federal associations of 5% of insured accounts were required to be met in one year's time rather than over 20 years, Federal associations probably would have larger deductions, in that one year, than would State institutions. The argument fails, however, since the larger ultimate reserve requirements of State institutions necessarily provide larger total deductions eventually. In the case of a Massachusetts cooperative bank, for example, which ultimately must reserve 10% of deposits, the deductions in time will total more than twice those of a comparable Federal association, required to reserve only 5% of checking and savings account balances.

More importantly, the power conferred upon the Federal Savings and Loan Insurance Corporation to regulate the rate of additions to reserves of Federal associations was obviously designed to advance the national goals of promotion of thrift, safety of deposits, and the regulation of the supply and flow of funds for home financing. The power clearly was not conferred to neutralize discriminatory state taxing policies; that result was mandated by §1464(h). It should be noted that this power to alter by regulation the rate of additions to reserves has been exercised on a number of occasions, *e.g.* 16 Fed. Reg. 1818 (1951), 21 Fed. Reg. 5483 (1956), 29 Fed. Reg. 7090 (1964), while

Congress, in the Emergency Home Finance Act of 1970, extended to 30 years the period in which to satisfy the reserve requirement, if "necessary to meet mortgage needs." 84 Stat. 463 (1970). Congress could hardly have intended that the effective use of important regulatory tools which it had provided be sacrificed in order to eliminate discriminatory results of state taxation when such results could be, and had been, forbidden directly.

The Massachusetts Court's inquiry as to whether a "substantial competitive disadvantage" existed also is not warranted. Again, the plain words of the Federal statute prohibit any state tax "greater than" that imposed on state-chartered institutions. Had Congress wished to forbid only those taxes imposing a "substantial competitive disadvantage," it would have so provided. This Court's statement in the *Laurens* case that 12 U.S.C. §1464(h) "unequivocally" bars discriminatory taxation provides for no exceptions, 365 U.S. at 523, and should not be eroded.

As a minimum, the Commonwealth should have the burden of showing "just reason" for discrimination once discrimination has been shown, as required under 12 U.S.C. §548, which prohibits discriminatory taxation of national banks. *Michigan National Bank* v. *Michigan*, 365 U.S. 467, 473 (1961). Compare dissent, *id.* at 497-498, as to whether any discrimination may be excused in the case of national banks. The State Tax Commission has made no attempt to provide a reasonable basis for the local preference. Unlike 12 U.S.C. §548, which prohibits discrimination in favor of "other moneyed capital . . . coming into competition with the business of national banks," 12 U.S.C. §1464(h) is concerned only with whether or not favored institutions are "similar." This difference in approach may be attributed to the fact that na-

tional banks are in competition with a wide variety of moneyed capital. Because of that variety, significant competitive differences may exist which might justify preferential treatment of local institutions in certain instances. Thrift institutions have a narrower focus of operation, however, and 12 U.S.C. §1464(h) therefore deals only with whether institutions are "similar." That very similarity, once determined to exist, should make inquiry into perceived competitive differences unnecessary. Proof—or disproof—of such fine differences would be a difficult burden.

Further, the basis for the Supreme Judicial Court's conclusion that a substantial competitive advantage had been shown, offsetting the burden of discriminatory taxation, is without factual foundation and was not advanced by the Commonwealth. The Court stated:

> Because of lower reserve requirements, Federal associations tend to have more funds available for immediate distribution to members than similarly situated State institutions.

Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482. The record is devoid of evidence concerning the relative dividend paying capacities of the various types of institutions. In any event, permissible dividends are primarily a function of action by the appropriate regulatory authorities. The Massachusetts Commissioner of Banks establishes limitations on the rate of interest or dividends payable on deposits by non-Federally insured Massachusetts banks, including savings banks and cooperative banks. Mass. G.L. c. 167, §18B(2). Those State-chartered thrift institutions which are insured by the Federal Deposit Insurance Corporation are subject to interest or dividend limitations established by its Board of Directors. 12 U.S.C. §1828.

Federal savings and loan associations are subject to limitations established by the Federal Home Loan Bank Board. 12 U.S.C. §1425b(a).

As an illustration of how dividend levels are actually determined, when Massachusetts banks not subject to Federal limitations were authorized to pay 5¼% on regular savings accounts in contrast to the 5% limitation applicable to Federal associations, Regulation of the Commissioner of Banks, July 31, 1970, the Federal Home Loan Bank Board made an exception to its national rule, allowing institutions whose home office was in Massachusetts to pay 5¼%. 35 Fed. Reg. 12388 (1970). In addition, when, in 1972, State institutions were allowed to pay interest on so-called Negotiable Order of Withdrawal ("N.O.W.") accounts, *Consumer Savings Bank* v. *Commissioner of Banks,* 361 Mass. 717 (1972); Mass. G.L. c. 167, §16A, Congress followed the State and authorized those Federal associations located in Massachusetts to do the same. P.L. 93-100, §2, 87 Stat. 342 (1973), 12 U.S.C. §1832. This series of competitive State and Federal regulatory actions strongly supports the view that Massachusetts thrift institutions, not Federal associations, had a superior dividend paying capacity. Thus, while reserve requirements constitute a threshold condition to any dividend payment, they have little effect, in practice, on the amount of dividends actually paid. Neither fact nor argument can support the view that lower reserve requirements give Federal savings and loan associations a competitive advantage to help offset their burden of greater taxation.

Finally, it should be noted again that the Supreme Judicial Court of Massachusetts conceded that the tax in question discriminates against Federal savings and loan associations. Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482. The issue here is only whether such discrimina-

tion may be excused. In the brief filed in support of their motion to dismiss the appeal in this case, the Appellees argued only that no discrimination exists. That argument is not only too late but also baseless.

Perhaps the most dramatic example of the fact of discrimination is provided by the tables in the Appendix. Of the 147 cooperative banks *all* received deuctions for guaranty fund additions for *all* years except for two banks. The Grafton and New Bedford Acushnet cooperative banks qualified for deductions in some but not all years. A. 16-61. Most Federal associations, on the other hand, repeatedly failed to qualify for deductions. Twenty-five of the thirty-four Federal associations in the Commonwealth obtained no deduction on at least two occasions over the seven years for which statistics were available. A. 112-129. In particular, Bay State Federal Savings and Loan Association was entitled to *no deduction for any year*. A. 113.

In their brief, the Appellees noted that Federal associations received a greater deduction for reserve additions than did Massachusetts cooperative banks in the most recent year shown in the record. Appellees' Brief in Support of Motion to Dismiss at 14. Omitted was the fact that cooperative banks received larger aggregate deductions for additions to reserves than did Federal associations in six out of the seven years for which complete data is shown in the record. A. 131-132. State savings banks received larger aggregate deductions than Federal associations in four of the seven years, equal deductions in one year, and lesser deductions in two years. *Id.* The record is more than ample to support the Supreme Judicial Court's finding of adverse discrimination against Federal associations, and that finding should be sustained.

The Appellees' brief to this Court also raised for the first time in this litigation the argument that the discrimination contained in the income-based portion of the tax was purged of taint by the earlier holding of the U. S. Court of Appeals that the deposits portion of the tax was discriminatory and therefore invalid as to Federal associations. This argument should be rejected for several reasons. First, as the Commonwealth acknowledged, the record contains no support for the argument. Appellees' Brief in Support at 11.

Second, the argument was not raised in the courts below, and the Appellees therefore should be precluded from raising it here. *See Hormel* v. *Helvering*, 312 U.S. 552, 556-557 (1941); *Singleton* v. *Wulff*, 428 U.S. 106, 119-121 (1976).

Third, the opinion of the Massachusetts Court indicates that it was fully aware of the inapplicability of the deposits portion of the tax to Federal associations. Mass. Adv. Sh. (1977) at 898, 363 N.E. 2d at 478. Nevertheless, it proceeded to analyze the Associations' discrimination arguments by reference solely to the income-based portion of the tax.

Fourth, the effective functioning of the judicial process in a federal system requires that litigants not be denied relief because of the choice of a Federal or state forum in which to bring actions combining both Federal and state issues or because the chosen court sees fit to abstain as to particular issues in the interest of comity. The Federal courts, in which the tax imposed by §11 was first challenged, had jurisdiction to decide both the Federal and state law issues presented as to both the deposits and the income-based portions of the tax. The District Court decided the Federal issues as to both portions but abstained as to the state law claims on the ground

that they were then pending before the State Tax Commission. *United States* v. *State Tax Commission,* 348 F. Supp. 397, 401 (D. Mass. 1972). The Court of Appeals upheld this abstention and abstained further from ruling on the Federal challenge to the income-based portion of the tax on the ground that the taxpayers had a "plain, adequate and complete" remedy in the Massachusetts courts. *United States* v. *State Tax Commission,* 481 F.2d 963, 973 (1st Cir. 1973). While discretionary abstention by the Federal Court inevitably resulted in a hiatus between its grant of partial relief and a final determination by the state courts, the Court of Appeals could not have intended that its action would preclude any further relief.

Fifth, and last, there is no logic to preferring one discriminatory tax provision over the other. The discrimination inherent in the income-based portion of the tax certainly is made no less offensive by a holding that the deposits-based portion, enacted together with it, is deliberately discriminatory. The order in which the two portions are addressed by the courts cannot alter the validity of either.

B. Massachusetts Credit Unions Are Mutual Thrift and Home Financing Institutions "Similar" to Federal Savings and Loan Associations.

Massachusetts credit unions are conceded to be "local mutual or cooperative thrift and home financing institution[s]." Mass. Adv. Sh. (1977) at 912, 363 N.E. 2d at 483. The issues here are what standards should be used in judging whether Massachusetts credit unions are "similar" to Federal savings and loan associations within the meaning of 12 U.S.C. §1464(h) and whether that standard has been met.

1. *Standards of Similarity.*

The Associations urge that the proper focus of comparison is the statutory powers conferred upon the two kinds of entities. The Massachusetts Court rejected this standard, stating: "The test for similarity is not what each type of institution might do but rather what each does in fact . . . ." Mass. Adv. Sh. (1977) at 913, 363 N.E. 2d at 484. In so holding, the Court failed to distinguish the many opinions of this Court under 12 U.S.C. §548 which deal with the question of whether moneyed capital is in substantial competition with national banks and the opinion of this Court in *Morrissey* v. *Commissioner,* 296 U.S. 344 (1935), which is the leading case on classification of entities as associations taxable as corporations, trusts, or partnerships under the Internal Revenue Code.

In *Mercantile Bank* v. *New York,* 121 U.S. 138 (1887), Justice Matthews focused on the *powers* of New York trust companies to determine whether they were "banking institutions" similar to national banks, stating:

> Trust companies . . . in New York, according to the powers conferred upon them by their charters and habitually exercised, are not in any proper sense of the word banking institutions. They have the following powers: To receive moneys in trust and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation or by any court of record; to receive the title to real or personal estate on trusts created in accordance with the laws of the state and to execute such trusts; to act as agent for corporations in reference to issuing, registering, and transferring certificates of stock and

bonds, and other evidences of debt; to accept and execute trusts for married women in respect to their separate property; and to act as guardian for the estates of infants. It is required that their capital shall be invested in bonds and mortgages on unincumbered real estate in the State of New York worth double the amount loaned thereon, or in stocks of the United States or of the State of New York, or of the incorporated cities of that state.

It is evident, from this enumeration of powers, that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce.

Id. at 159 (emphasis added).

That the proper focus of inquiry should be the statutory powers of the entities is supported by a comparison of the language of 12 U.S.C. §1464(h) with that of 12 U.S.C. §548, the provision granting to the states power to tax national banks. In *Michigan National Bank* v. *Michigan,* 365 U.S. 467 (1961), this Court stated that those two statutory provisions are to be read "in pari materia." *Id.* at 481. The two statutes are thus to be construed by reference to one another. The language of 12 U.S.C. §548 explicitly limits the proscriptions of that statute to the unequal taxation of moneyed capital "coming into competition with the business of national banks" and so requires consideration of the actual uses to which the various kinds of moneyed capital might be put. By contrast, the language of 12 U.S.C. §1464(h) makes no reference to actual competition and gives no indication that the proscriptions of the statute are to hinge on it. Construing the two statutes by reference to each other, it appears that "similarity," under 12 U.S.C. §1464(h), is

to be judged solely by "what each type of institution might do," in contrast to the inquiry as to actual competition required under 12 U.S.C. §548.

In the *Morrissey* case, a trust with transferable shares had been created to develop a tract of land through the improvement and sale of a portion of the tract and to construct a golf course on the balance of the land. All sales activity had been completed prior to the beginning of the tax years before the Court. The trustees argued that the absence of business activities in those years should be taken as evidence of the character of the trust. Rejecting the test of "what each does in fact," imposed here by the Massachusetts Court, and adopting instead the test of "what each type of institution might do," this Court stated:

> The fact that these sales were made before the beginning of the tax year here in question . . . did not alter the character of the organization. *Its character was determined by the terms of the trust instrument* . . . . The powers conferred on the trustees continued and could be exercised for such activities as the instrument authorized.

296 U.S. at 361 (emphasis added).

In those instances in which the Massachusetts Court has addressed the issue of "similarity," it has failed to consider the cases discussed above and has failed to clearly articulate the basis for its holdings. In two cases, that Court held local cooperative and savings banks to be similar to Federal associations because of their common "appeal to the same type of investor and to the same class of borrowers." *Commissioner of Corporations and Taxation* v. *Flaherty,* 306 Mass. 461 (1940), *cert. denied,* 312

U.S. 680 (1941); *Springfield Institution for Savings* v. *Worcester Federal Savings and Loan Association,* 329 Mass. 184, *cert. denied,* 344 U.S. 884 (1952). Neither case discloses the basis upon which the judgment was reached. Nor is there any indication whether the judgments were based upon a comparison of statutory purposes and powers, factual operations or some combination of both.

Of the state court opinions which have considered the credit union issue, each has also failed to address the national bank cases or the *Morrissey* case. See discussion of those opinions *infra* at 42-45. To the extent that a standard can be discerned, those courts appear to have applied an Equal Protection Clause standard, thus making the affirmative command of the Federal statute superfluous.

As a frame of reference for deciding whether the similarities of Massachusetts credit unions to Federal associations are substantial, it is instructive to consider the relationship of both entities to national banks. In *Michigan National Bank* v. *Michigan*, 365 U.S. 467, 470 (1961), this Court assumed, for purposes of the decision under 12 U.S.C. §548, that state savings and loan associations were moneyed capital in substantial competition with national banks. It also suggested, without deciding, that 12 U.S.C. §1464(h) might allow states to exempt state thrift institutions from the tax imposed on national banks, so long as they were taxed to the same extent as Federal associations. *Id.* at 481. While the issue is not present here, it would appear highly probable that Massachusetts credit unions also represent moneyed capital in substantial competition with national banks. The managing director of the Credit Union National Association has been quoted as stating:

> The [commercial] banks have lately decided . . . that the future is in consumer lending . . . . They are walking all over our [the credit unions'] side of the street . . . . In addition, the credit unions would like to move more aggresively into the territory of savings and loan associations—home mortgages.

Boston Sunday Globe, June 6, 1976, at 8, col. 4.

Given the increasing competition between credit unions and national banks, it is fair to predict that one or more national banks will challenge their liability under state tax statutes which give a privileged status to credit unions. The probability of such a challenge almost certainly will be enhanced if Massachusetts credit unions are found to be "not similar" to Federal associations since, collectively, they ought to be in one category or the other. If, however, credit unions are held to be "similar" institutions within the meaning of 12 U.S.C. §1464(h), the states might permissibly tax all thrift institutions, both Federal and state, preferentially.

2. *Statutory Powers.*

If similarity is to be determined by reference to their respective powers, as the Associations urge, Massachusetts credit unions must be held to be similar to Federal associations. It should be noted at the outset that Massachusetts credit unions are, in their powers and their practices, quite different from Federal credit unions and from those chartered by many other states, which have restricted membership and cannot enter into residential home financing in a practical sense. *See, e.g.,* 12 U.S.C. §§1757(5), 1759.

The statutory powers of Massachusetts credit unions are scaled, to some extent, according to the size of the individual credit union. Mass. G.L. c. 171, §§24(A) and 24(B). The Massachusetts tax statute, however, fails to make similar distinctions. All Massachusetts credit unions, from

the smallest to the largest, regardless of their powers and practices, are granted a blanket exemption from State taxation.

As indicated below, the statutory powers of Federal associations and Massachusetts credit unions are similar with respect to the three primary phases of their operation: (1) the mutuality of ownership and control, (2) the ability to attract savings, and (3) the ability to make first mortgage residential real estate loans. To the extent that the powers are not identical, it is the credit unions which have greater powers and an improved competitive position as contrasted to Federal associations.

Mutuality of ownership and control is required for Federal associations and Massachusetts credit unions by similar statutory provisions. Unlike national banks, these entities do not have a class of stockholders separate and distinct from their depositors and borrowers. *See Michigan National Bank* v. *Michigan,* 365 U.S. 467, 482 (1961). All depositors and borrowers of these entities are called "members," and the members all have the right to vote in the election of directors. 12 C.F.R. §554.1; Mass. G.L. c. 171, §13. Every member of a Federal association is entitled to at least one vote and no more than fifty votes. 12 C.F.R. §544.1(a) and (b). Every member of a Massachusetts credit union is entitled to one, but only one, vote. Mass. G.L. c. 171, §§10, 13 and 24. Thus, both entities limit voting rights so that no single member may cast more than a small percentage of the total votes.

As to the ability to attract savings, larger Massachusetts credit unions have the power to accept deposits or issue shares on terms similar to those offered by Federal associations. In a credit union with over $4,000,000 in specified assets, individual deposit or share accounts of $33,000 are permitted while joint accounts may total

$66,000. Mass. G.L. c. 171, §10, as amended by Acts 1977, c. 15. Credit union deposits may be insured by the National Credit Union Association. Mass. G.L. c. 171, §35, 12 U.S.C. §1781(a). The accounts of depositors in Federal associations are insured by the Federal Savings and Loan Insurance Corporation. 12 U.S.C. §1728(a). In addition, Massachusetts credit unions are limited, with minor exceptions, to dealing with the individual, non-commercial depositor and borrower, whose business they share with Federal associations. 5 Opinions of the Attorney General of the Commonwealth of Massachusetts 269 (1918); Mass. G.L. c. 171, §5. Recent statutory enactments permit Massachusetts credit unions, along with savings banks and savings and loan associations, to accept deposits of legacies, unclaimed monies and fiduciary deposits. Acts 1977, c. 16-18. Further, credit unions are authorized to pay an interest rate approximately 50% greater than Federal associations may pay. Credit unions may pay a maximum interest rate of 8%, Mass. G.L. c. 171, §25, whereas Federal associations are limited to an interest rate of 5 1/4% on ordinary deposits. 12 C.F.R. §526.3. In this respect, credit unions have a clear competitive advantage over Federal associations in attracting deposits. In summary, the power of Massachusetts credit unions to attract savings is at least as strong as that of Federal associations.

Finally, and most important, Massachusetts credit unions have the statutory power to make residential real estate loans on substantially the same terms and to substantially the same extent as Federal associations. Credit unions have the statutory authority to make loans secured by first liens on real estate for terms up to 30 years, for 90% of the value of the property and to a maximum

amount of $50,000. Mass. G.L. c. 171, §§24(B)(a)(4) and (b)(8), as amended by Acts 1977, c. 22. Federal associations may make real estate loans for a maximum term of 30 years, to the extent of 80% of the value of the property, and to a maximum amount of $55,000. 12 U.S.C. §1464(c); 12 C.F.R. §545.6-1(a)(i). Real estate loans may be made anywhere within Massachusetts by a credit union, Mass. G.L. c. 171, §24(B)(b)(4), or a Federal association, 12 C.F.R. §545.6-6, with its principal place of business within the Commonwealth. Finally, large credit unions may invest up to 80% of their assets in real estate loans, Mass. G.L. c. 171, §24(B)(b)(7), while Federal associations may invest 95% of their assets in real estate loans. 12 U.S.C. §1425a(b); 12 C.F.R. §523.11.

In only two instances do the statutory provisions governing Massachusetts credit unions appear to be noticeably different from the provisions governing Federal associations. In both instances the differences are largely illusory First, Massachusetts credit unions may make loans only to members. Mass. G.L. c. 171, §24. There are, however, no statutory provisions that limit the membership of a credit union, and the smallest deposit in a credit union will qualify a prospective borrower as a member. Second, Massachusetts credit unions are admonished to give "preference" to personal loans. Mass. G.L. c. 171, §24. The statute does not, however, provide any method for enforcement of the preference provision other than by way of limitations related to the size of the union.

The Massachusetts Court also found the statutory purposes of Massachusetts credit unions and Federal associations to be different. Mass. Adv. Sh. (1977) at 913, 363 N.E. 2d at 484, n.9. However, the statutory purposes of the former institutions encompass that of the

latter. The purposes of Massachusetts credit unions are to accumulate and invest savings of members and to make loans for provident purposes, Mass. G.L. c. 171, §2, while the purpose of Federal associations is to provide local mutual thrift institutions in which people may invest their funds in order to provide for the financing of homes. 12 U.S.C. §1464(a). Obviously, home financing is a "provident" purpose. Consequently the purposes of credit unions encompass and extend beyond the purpose of Federal associations and should be held to be similar.

3. *Actual Practices.*

Even if similarity were to be determined by reference to the actual practices of Massachusetts credit unions and Federal associations, this Court should nevertheless hold that the two types of entities are similar. Because determination of similarity under 12 U.S.C. §1464(h) is a question of Federal law, this Court is not bound by the conclusion of the court below. As this Court has stated, in scrutinizing actual competition against national banks under 12 U.S.C. §548, "The question is . . . a mixed one of law and fact, and in dealing with it we may review the facts in order correctly to apply the law." *First National Bank of Hartford, Wisconsin* v. *City of Hartford,* 273 U.S. 548, 552 (1927). In the present case, the facts submitted by the Federal associations consist primarily of statistics compiled and published by the Commonwealth itself and are thus particularly appropriate for independent analysis by this Court. These statistics establish that larger Massachusetts credit unions are in actual and substantial competition with Federal associations.

In actual practice, larger Massachusetts credit unions compete with Federal associations in the area which produces the great majority of such associations' revenue, viz.

home mortgage loans. As acknowledged by the Massachusetts Court, Massachusetts credit unions in 1972 placed 30.1% of their total investments and 42% of their total loans in real estate mortgages. Mass. Adv. Sh. (1977) at 914, 363 N.E. 2d at 484. Thus, Massachusetts credit unions collectively invested in real estate loans to nearly the same extent they invested in personal loans. The percentages for 1972 are representative of all years relevant to this action beginning with 1966. See A. 136-144. In terms of dollars, Massachusetts credit unions had total assets in excess of one *billion* dollars and real estate loans of $329,499,463. ANNUAL REPORT OF THE MASSACHUSETTS COMMISSIONER OF BANKS FOR 1973, Section B at 84.

Many individual Massachusetts credit unions have made real estate loans in excess of personal loans. In 1973, twenty of the larger credit unions invested more than 50% of their total assets in home mortgage loans, five credit unions invested more than 70% of their assets in home mortgage loans, and one credit union invested over 86% of its assets in home mortgage loans. In terms of dollars, the real estate loans by these 20 credit unions totalled over $170,000,000. A. 146. Over 50% of Massachusetts credit unions made some real estate loans and those credit unions held over 80% of the total assets of Massachusetts credit unions. ANNUAL REPORT OF THE MASSACHUSETTS COMMISSIONER OF BANKS FOR 1973, Section B at 46-79. The above data emphasizes the broad powers of Massachusetts credit unions to make real estate loans and and shows that many credit unions are, in practice, utilizing those powers in such a way that their loan activities are nearly identical to those of Federal associations.

While the Massachusetts Court did not reach the question whether any or all of the Associations would be entitled to relief ". . . if it were shown that one Federal association was in substantial competition with one or more credit unions," Mass. Adv. Sh. (1977) at 914, 363 N.E. 2d at 484, the statistics presented to the Court demonstrate such direct individual competition. For example, two of the Associations, Security Federal Savings and Loan Association of Brockton, and Montello Federal Savings and Loan Association of Brockton, have their offices in Brockton, Massachusetts. A. 10-11. Of the credit unions with more than 80% of their assets invested in mortgage loans, two are located in Brockton. Those two credit unions, the Brockton Brotherhood Credit Union and the Crescent Credit Union, had approximately 74% of their assets invested in real estate loans with over $25,000,000 in outstanding real estate loans and total assets of nearly $34,000,000. A. 146. Similar examples of Federal associations having their principal place of business in the same town or city as one or more credit unions with a major percentage of its assets invested in real estate loans may be found in the important markets of Boston, Brookline, Fitchburg and Lowell. A. 10-11, 146.

The above statistics are sufficient to establish competition at the individual level; it is not necessary to show that a particular credit union enticed a particular customer away from a particular Federal association. As stated by this Court in *First National Bank of Hartford, Wisconsin* v. *City of Hartford*, 273 U.S. 548 (1927):

> We do not conceive that in order to establish the fact of competition [within the meaning of the predecessor of 12 U.S.C. §548] it is necessary to show that national banks and competing investors solicit the same customers for the same loans or investments. It is enough as stated if both engage in seeking and

> securing in the same locality capital investments of the class now under consideration which are substantial in amount.

Id. at 559. In the companion case of *Minnesota* v. *First National Bank of St. Paul*, 273 U.S. 561 (1927), the Court concluded that actual competition existed between national banks and note brokers on the basis of general business statistics without a showing that the note brokers deprived the banks of any particular customers or any specific amount of business. *Id.* at 565-566. Indeed, the decisions of the Massachusetts Court, which held State-chartered cooperative banks and savings banks to be similar to Federal associations, appear to have been based upon less evidence of direct competition than the Associations have submitted in the present case. *See Commissioner of Corporations and Taxation* v. *Flaherty*, 306 Mass. 461, 461-462 (1940), *cert. denied*, 312 U.S. 680 (1941); *Springfield Institution for Savings* v. *Worcester Federal Savings and Loan Association*, 329 Mass. 184, 185-186, *cert. denied*, 344 U.S. 884 (1952).

The prior decisions of certain state courts to the effect that credit unions chartered by their respective states were not "similar" to Federal associations are not determinative of the issue in this case. Massachusetts credit unions are unlike many other state-chartered credit unions. Massachusetts credit unions are among the most active in the area of home mortgage loans. As noted by the National Credit Union Administration:

> In some States, loans outstanding secured by real estate comprised a *very substantial* proportion of total loans outstanding. For example, Massachusetts, New Hampshire, and Rhode Island each had more than 40% of their total loans outstanding secured by real estate.

> NATIONAL CREDIT UNION ADMINISTRATION, 1973 ANNUAL REPORT, "State-Chartered Credit Unions," 2-3 (emphasis added). At the end of 1973, credit unions in 32 states reported some real estate loan activity. Among those states with some such activity, real estate loans as a percentage of total loans outstanding ranged from less than 1% in Arizona to 54% in Rhode Island. *Id.* Thus, it is apparent that the determination of similarity must be made on a state by state basis.

In *First Federal Savings & Loan Association of New Haven* v. *Connelly*, 142 Conn. 483 (1955), *cert. denied*, 350 U.S. 927 (1956). The opinion of the Connecticut Supreme Court contained *no* discussion of the respective powers or practices of the two entities. The denial of jurisdiction on appeal, 350 U.S. 917 (1956), did not set forth the basis of denial.

A Minnesota decision contained an extensive discussion of the powers and practices of Minnesota credit unions, but those powers and practices were materially different from those of Massachusetts credit unions. *State* v. *Minnesota Federal Savings & Loan Association*, 218 Minn. 229 (1944). Membership in Minnesota credit unions was limited to persons with "a common bond of occupation or association, or a group within a well-defined rural district," *id.* at 236, while there is no limitation on membership in Massachusetts credit unions. The Minnesota credit unions had only $750,000 invested in real estate loans, *id.* at 232, contrasted with the over $329,000,000 invested in such loans by Massachusetts credit unions. The Minnesota credit unions were limited to real estate loans within 50 miles of their offices, unlike Massachusetts credit unions which may make real estate loans throughout the state. Moreover, the Court based its decision on the belief that

> ". . . the legislature 'has a wide discretion in classifying property for the purposes of taxation . . . .' '". . . the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference . . . .'" ' " . . . "The difference . . . need not be great . . . ."

Id. at 234 (citations omitted). It thus applied a standard more appropriate for determinations governed solely by the Equal Protection Clause of the U.S. Constitution.

While a New Hampshire case cannot be so readily distinguished on the basis of differences in statutory powers or actual practices, its result may be best understood in light of its use of the same totally inappropriate standard for determining similarity. In *Manchester Federal Savings and Loan Association* v. *State Tax Commission,* 105 N.H. 17, 20 (1963), the New Hampshire Supreme Court made the remarkable statement that:

> We do not blink at the fact that the state credit unions have similarities to the plaintiffs and the co-operative banks, that competition for the loan dollar exists. . . .

Despite this acknowledgment of similarity and competition, the Court upheld the New Hampshire tax. In so doing, it too assimilated the question of whether two entities are similar for purposes of 12 U.S.C. §1464(h) to the quite different question of whether a legislative classification has the minimal degree of "reasonableness" necessary to withstand a challenge under the Equal Protection Clause. The Court held:

> . . . we conclude that distinctions between credit unions on the one hand and federal savings and loan associations and cooperative banks on the other are substantial enough to warrant the exemption of the former and

> the inclusion of the latter without violating 12 U.S.C.A., §1464(h). *These distinctions* in size of operation, statutory restrictions and provisions, lending policy, ratio of real estate and unsecured loans to total assets, compensation of officers and in profit-making, *cannot be deemed to be negligible.* The Legislature has wide powers in the classification of subjects of taxation. The classification of credit unions as exempt from the franchise tax on banks *is a reasonable one which the Legislature had the power to enact without denial of due process or equal protection of the law under either the state or Federal Constitutions.*

105 N.H. at 20-21 (emphasis added and citations omitted).

By their failure to distinguish between a determination of similarity under 12 U.S.C. §1464(h) and one made solely under the Equal Protection Clause, these state courts have effectively nullified the Federal statute. Their opinions were based not on whether substantial similarities existed, but rather on whether any dissimilarities could be found, even if they were, in the words of the Minnesota Court, "not . . . great." 218 Minn. at 234. Even if such a standard were thought appropriate for Equal Protection purposes, it would not be sufficient in the face of the direct anti-discrimination mandate of a Federal statute. The many decisions under 12 U.S.C. §548 show that that statute provides greater protection than is provided under the Equal Protection Clause alone. This Court's statement in the *Laurens* case that discrimination is "unequivocally" prohibited indicates that 12 U.S.C. §1464(h) provides greater protection as well. To hold otherwise would be to make the statute superfluous.

In summary, the Associations urge that the proper method for determining similarity is a comparison of the

statutory purposes and powers of the entities and, in particular, that two entities are "similar" within the meaning of 12 U.S.C. §1464(h) if they have the power to compete with one another to a significant degree. Even if similarity is to be determined by a comparison of actual practices, as held by the Massachusetts Court, entities should be found similar if there is substantial competition. The statutory purposes of credit unions encompass the purpose of Federal associations and should be held to be similar. The statutory provisions governing the form of organization, acceptance of deposits and ability to make home mortgage loans for Massachusetts credit unions are substantially similar to those for Federal associations. Moreover, Massachusetts credit unions, in fact, make substantial real estate loans in direct competition with Federal associations. By subjecting Federal associations to taxation while granting Massachusetts credit unions a total exemption from taxation, Massachusetts General Laws, Chapter 63, Section 11, violates 12 U.S.C. §1464(h).

C. Massachusetts G.L. c. 63, §11 does Not Impose a Tax on an Authorized Subject of Taxation under 12 U.S.C. §1464(h) and Is Defective in Form.

It has long been established that the states have no inherent power to tax instrumentalities of the Federal government. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819); *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824). The taxing power of the states is in this respect dependent entirely on the permissive legislation of Congress. *Owensboro National Bank* v. *Owensboro,* 173 U.S. 664, 668 (1899). Federal savings and loan associations are Federal instrumentalities like the national banks involved in the cited cases. *United States* v. *State Tax Commission,* 481 F.2d 963, 969 (1st Cir. 1973).

In authorizing the states to impose nondiscriminatory taxes on Federal savings and loan associations, Congress specifically enumerated the bases of such taxation, as follows:

> No State . . . shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

12 U.S.C. §1464(h). These are the only modes of taxation authorized.

The form of the statute suggests that the enumerated subjects of taxation are the exclusive bases of taxation permitted. The form of the statute also suggests that identical bases of taxation of Federal and state thrift institutions must be subjected to tax if a tax is imposed. For example, an attempt to tax the capital only of a Massachusetts cooperative bank while concurrently taxing the income only of a Federal association appears to be prohibited. If realistic and ready comparisons of the relative tax burdens of Federal and state associations are to be made, the conclusion is sound.

Considerable difficulty, however, is encountered in correctly identifying the character of the tax imposed by Mass. G.L. c. 63, §11. The complexity of the statute is the source of the difficulty, since the nominal subjects of taxation are not the true objects of the tax. For example, the so-called deposits element of the tax, dealt with by the Court of Appeals for the First Circuit, §§11(a)(2) and (b)(2), allows a deduction for the largest uses of deposits — real estate loans and banking facilities. The primary objects of the tax imposed by that portion of §11 are out-

of-state loans, personal loans and investments in intangibles.

Similarly, the so-called income measure of the tax, which is at issue here, variously labelled as an income tax and a franchise tax, was described by the Massachusetts Court as *a tax on the dividend paying capacity of the Associations.* The description is believed to be accurate. So defined, however, the tax must fail since "dividend paying capacity" is not an authorized subject of taxation under §1464(h).

Further, as a result of the decisions of the Massachusetts Supreme Judicial Court and the Court of Appeals for the First Circuit, the tax for state institutions is now measured in part by a tax on intangible investments and in part by an income-based element of tax, whereas Federal associations are taxed only on their "income," but at a greater rate. Thus, §11 as originally enacted and as now in force is defective in form because it utilizes different measures of the tax.

In interpreting a similar Congressional grant to the states of power to tax national banks, this Court described the statute in question, 12 U.S.C. §548, as "intended to prescribe the only ways in which the States can tax national banks." *First Agricultural Bank* v. *State Tax Commission,* 392 U.S. 339, 343 (1968). That statute has been described as "in pari materia" with 12 U.S.C. §1464(h), the provision involved here. *Michigan National Bank* v. *Michigan,* 365 U.S. 467, 481 (1961). Congress surely has been no less concerned to protect those institutions granted Federal charters as savings and loan associations than those chartered as national banks. Since, as is indicated below, the tax being challenged here is not one of those enumerated in the statute, it is not authorized. Even viewed in the light

of the descriptive labels applied by the lower courts, the tax ought still to fail for the reasons which follow.

1. *Franchise Tax.*

The Massachusetts Court has characterized this tax as a franchise tax. Mass. Adv. Sh. (1977) at 904-905, 363 N.E. 2d at 480. The characterization is not accurate and should be rejected. As this Court has stated:

> . . . neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. . . . [T]his Court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be . . . .

Macallen Co. v. *Massachusetts,* 279 U.S. 620, 625-626 (1929).

> . . . [T]he nature of a tax must be determined by its operation rather than by particular descriptive language which may have been applied to it.

Educational Films Corporation of America v. *Ward,* 282 U.S. 379, 387 (1931).

The taxes imposed upon corporations in Masssachusetts historically have been in the nature of excises or duties upon the privilege of doing business in corporate form, that is, franchise taxes. *Provident Institution* v. *Massachusetts,* 6 Wall. 611, 616 (1867). Such a scheme of corporate taxation remains in use at the present time. In its design, §11 imposes a tax on two elements, deposits nominally and income nominally. The Massachusetts court relied on past decisions approving deposits and income as proper measures of the franchise, but such reliance was misplaced.

Deposits, however, are not the measure of the tax. Because of deductions provided for other uses, only those deposits committed to most extraterritorial real estate loans, personal loans and intangible investments are really subjected to tax. Less than 30% of deposits are so committed. A. 135-144. This highly particularized use of a small portion of deposits cannot be held to measure the value of a franchise.

The income-based portion of the tax is equally defective for two reasons. First, the deduction for additions to reserves is unrelated to income. See *infra* at 58-59. Second, the failure to provide for apportionment precludes the use of income as a franchise measure. That the privileges taxable by a state may be only those privileges which it has granted should require little discussion. Even absent the constitutional limitations on extraterritorial taxation discussed in Parts D and E of this brief, a state tax which takes the form of a franchise tax can only be applied to a corporation chartered by another sovereign to the extent that that corporation avails itself of the privilege of exercising its franchise in the taxing state. Where a franchise tax is measured by income, such income must be limited to that derived from carrying on business within the taxing state.

The draftsmen of Massachusetts tax statutes generally have recognized these inherent limitations on franchise taxation and have provided an allocation or apportionment mechanism in such statutes. For example, the income-based excise generally applicable to business corporations is limited by an apportionment formula so as to reach only income "derived from business carried on within the commonwealth." Mass. G.L. c. 63, §38. Utility companies doing business both within and without Massachusetts pay an

income-based excise on that portion of their net income "allocable to the commonwealth." Mass. G.L. c. 63, §52A(2). In the case of life insurance companies, the applicable excise is measured by premiums received during the year for policies "allocable to the commonwealth" according to specified rules. Mass. G.L. c. 63, §20. Foreign fire, marine and other non-life insurance companies are subjected to an excise measured by premiums and assessments during the year "for insurance of property or interests in this commonwealth, or which are subjects of insurance by contracts issued through companies or agents therein." Mass. G.L. c. 63, §23.

Provisions like those cited above are absent from the section being challenged here. That fact was ignored by the Massachusetts Supreme Judicial Court in the opinion below, though it recognized that the tax is one imposed on "the privilege of doing business *in the Commonwealth.*" Mass. Adv. Sh. (1977) at 905, 363 N.E. 2d at 480 (emphasis added). The Court noted that it had previously approved the measurement of a franchise tax by income, citing *State Tax Commission* v. *John H. Breck, Inc.*, 336 Mass. 277 (1957). In that case, however, the tax being challenged was the one imposed on business corporations, which, as noted above, provides an apportionment formula to prevent extraterritorial taxation. The Court in *Breck* specifically noted that the purpose of the apportionment formula

> . . . is, of course, to limit the net income measure of the excise to that reasonably attributable to activities within or closely associated with Massachusetts, so as fairly to reflect the annual benefit to the taxed corporation of its *corporate privileges* (including their exercise, if exercised) *under Massachusetts law.*

336 Mass. at 285 (emphasis added).

The record indicates that approximately 35% of the income of the Associations for the years described was derived from loans secured by real estate located outside Massachusetts. A. 134. At least part of that income resulted from the exercise by the Associations of corporate privileges under the laws of other states. Thus, the absence of a reasonable system of apportionment or allocation in Section 11 of Massachusetts General Laws, Chapter 63, prevents it from being a true franchise tax of the sort included among the subjects of taxation enumerated in 12 U.S.C. §1464(h).

2. *Income Tax.*

The Massachusetts Court stated further that, even if not a franchise tax, the tax in question constitutes an "income" tax within the meaning of the Federal authorizing statute. Mass. Adv. Sh. (1977) at 905, 363 N.E. 2d at 481. It is submitted that such is not the case. While there may be some differences in detail among the definitions of "income" for Federal income tax, state income tax, economic, and accounting purposes, all are based upon the concept of net income.

In construing the term "incomes," as used in the Sixteenth Amendment to the U. S. Constitution, this Court stated that, while the question had been discussed extensively by economists,

> . . . we require only a clear definition of the term "income," as used in common speech, in order to determine its meaning in the Amendment . . . .

Eisner v. *Macomber,* 252 U.S. 189, 206-207 (1920). Applying that standard, the Court concluded:

> After examining dictionaries in common use . . . , we find little to add to the succinct definition adopted

> in two cases arising under the Corporation Tax Act of 1909 . . . — "Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets . . . .

Id. at 207. Thus, "income" is measured by "gain" or "profit," that is, the actual economic benefit received.

Looking to dictionaries in common use, as did the Court in *Eisner* v. *Macomber,* yields the same result. Thus, WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 424 (1970) defines "income" as "a gain or recurrent benefit usu[ally] measured in money that derives from capital or labor." Emphasizing again that only actual benefit is included, it defines "income tax" as "a tax on the *net* income of an individual or business concern" (emphasis added).

This common view is echoed in more technical sources. Thus,

> . . . as an economic concept income denotes a flow of wealth during a definite period, as opposed to capital as a fund of wealth at a distinct point of time. It may be defined as the money or money's worth which comes in during a definite period over and above the expenses of acquisition.

Seligman, *Income Tax,* 7 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 628-629 (1932), quoted in B. BITTKER AND L. STONE, FEDERAL INCOME, ESTATE AND GIFT TAXATION 39 (1972). In accounting terms,

> The income statement matches the inflow and outflow of assets resulting from enterprise operations for a specific time period. . . . The inflow of assets resulting from the sale of products or the rendering of services

> represents revenue. Assets used to generate revenue constitute expenses. The income statement measures the difference between revenue and the expenses for a particular segment in the life of the business enterprise.

K. Solomon, Lawyer's Handbook of Accounting Theory and Practice 8 (1971).

The Massachusetts Supreme Judicial Court, in fact, has applied just such a definition of income in interpreting the Commonwealth's own statutes. In *Barnes* v. *State Tax Commission,* 363 Mass. 589, 591 (1973), it stated:

> "Income" was long ago defined as "net income" in the context of an act which required a payment to the State subject to measure by that income,

citing *Opinion of the Justices,* 46 Mass. (5 Met.) 596, 598 (1844). In *Bingham* v. *Commissioner of Corporations and Taxation,* 249 Mass. 79, 80 (1924), the Court stated that the word "income," as used in the individual income tax chapter,

> . . . may be said to include the true increase in amount of wealth which comes to a person during a stated period of time.

However, as will be indicated, the Court, in effect, failed in this case to follow the above principles when interpreting the Federal government's grant to the states of power to tax Federal savings and loan associations.

The tax imposed by Chapter 63, Section 11, of the Massachusetts General Laws, as construed by the Court below, is not one levied on "income," as that term is used in the cases and authorities just discussed. While Section 11 provides a deduction for "operating expenses" in determining the "net operating income" on which the tax

is imposed, the Supreme Judicial Court held that ". . . dividends and interest paid to members are not 'operating expenses.' " Mass. Adv. Sh. (1977) at 903, 363 N.E. 2d at 480. While that holding is conclusive as an interpretation of Massachusetts law, this Court can consider whether it precludes classification of the tax as one on "income," as that term was used by Congress in 12 U.S.C. §1464(h).

The above holding by the Massachusetts Court was based on its conclusion that a depositor in a Federal savings and loan association stands in relation to the association as an owner, not as a creditor, and that payments to him are therefore in the nature of dividends, however described, not interest. Mass. Adv. Sh. (1977) at 900-902, 363 N.E. 2d at 479. This view ignores the practical function of payments made by thrift institutions to their depositors and is in conflict with current Congressional views on the nature of Federal associations, as indicated by the tax treatment of such payments under the Internal Revenue Code.

Whether an interest in a corporation constitutes debt or equity has been often litigated in the context of the Federal income tax, and many tests have been developed. *See O. H. Kruse Grain & Milling* v. *Commissioner,* 279 F.2d 123, 125-126 (9th Cir. 1960). As this Court has stated:

> There is *no one* characteristic, not even exclusion from management, which can be said to be decisive in the determination of whether the obligations are risk investments in the corporations or debts.

John Kelley Co. v. *Commissioner,* 326 U.S. 521, 530 (1945) (emphasis added).

While authorizing statutes and charters of mutual thrift institutions often utilize the terminology of ownership in describing depositors, using the word "dividend" in place

of "interest," for example, such depositors serve the same identical function as do depositors in non-mutual thrift institutions, *viz.* providing funds with which the institutions carry out their lending business. In order to characterize payments to such depositors, it is necessary to consider the relationship in practical terms.

The Massachusetts Court itself conceded that

> . . . account holders have ready access to their funds as a practical matter and it is likely that they think of their interests as substantially equivalent to cash. In this sense, a holder of an account is unlike the owner of a share in a corporation who cannot withdraw his ownership interest from the corporation at will. In particular circumstances State courts have concluded that the hybrid relationship between a depositor in a savings and loan association and the association creates a debtor-creditor relationship. See, e.g., *Mengele* v. *Christiana Fed. Sav. & Loan Ass'n,* 287 A.2d 395, 397 (Del. 1972) (Federal savings and loan association); *Family Sav. & Loan Ass'n Shareholders' Protective Comm.* v. *Stewart,* 241 Md. 89, 96 (1965) (State savings and loan association).

Mass. Adv. Sh. (1977) at 902, 363 N.E. 2d at 479, n.6. In addition, in contrast to the return on equity investments, which is determined by earnings, dividends or interest are paid by Federal associations as a percentage of deposits and at a rate determined primarily by the limitations established by the Federal Home Loan Bank Board. 12 U.S.C. §1425b(a). Deposits in a Federal association are also fixed in principal amount, experiencing neither capital appreciation nor erosion.

In considering debt-equity classification questions, the Federal courts have often focused on intent. Thus,

> It is often said that the essential difference between a creditor and a stockholder is that the latter intends to make an investment and take the risks of the venture, while the former seeks a definite obligation, payable in any event.

Commissioner v. *Meridian & Thirteenth Railroad Company,* 132 F.2d 182, 186 (7th Cir. 1942). In the statement quoted in the previous paragraph, the Supreme Judicial Court recognized that the intent of depositors in a Federal association or other mutual thrift institution is identical to that of depositors in non-mutual banking entities, that is, to earn a fixed return for the use of their money while retaining a right to withdraw the amount deposited at will or according to well-defined rules.

The above conclusions are reinforced by consideration of the role of deposits in both mutual and non-mutual institutions. In each case, deposits are a source of the funds used to carry on the institution's lending business. In each case, fixed, periodic payments are made to depositors for the use of such funds. Whether called interest or dividends, such payments overwhelmingly constitute the single largest expenditure by such institutions. *See* SJC App. 90-91. A tax which fails to provide a deduction from gross receipts for the largest cost of doing business is a tax on something other than net income.

While not conclusive in this context, generally accepted accounting principles, as described in the audit guide, *Audits of Savings and Loan Associations,* published by the American Institute of Certified Public Accountants, support the deductibility of dividends or interest paid by savings and loan associations in determining net income. See definition of "dividend," SJC App. 92.

Finally, it should also be noted that a deduction is provided to mutual thrift institutions for Federal income tax

purposes for amounts paid or credited to depositors as dividends or interest. 26 U.S.C. §591. Congress should not be assumed to have intended that "income" be defined differently for purposes of Federal and state taxation. Further, the Federal tax treatment thereby provided was intended to ". . . place mutual savings banks [and other covered mutual thrift institutions] on a parity with their competitors." S. Rep. 781, 82d Cong., 1st Sess. 25-26 (1951). The competitors described above—non-mutual, stockholder-owned institutions—are denied deductions for the true dividends paid to their stockholders but are allowed deductions for distributions in the form of interest to depositors. 26 U.S.C. §163.

3. *Reserve Additions.*

The tax imposed by §11 is also prevented from being one described in 12 U.S.C. §1464(h) by the allowance of a deduction for ". . . minimum additions during the taxable year to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities . . . ." The Supreme Judicial Court described the tax, without so labelling it, as a tax on the dividend paying capacity of thrift institutions by stating that the tax was:

> . . . measured by net income reduced by amounts of income which by law may not be made available, at least immediately, to members or depositors as interest or dividends.

Mass. Adv. Sh. (1977) at 906, 363 N.E. 2d at 481. "Dividend-paying capacity" is not one of the permitted bases of taxation enumerated in 12 U.S.C. §1464(h), however.

The allowance of a deduction for additions to reserves compounds the dissimilarity between what is sought to be taxed here and a tax on "income." The minimum required addition to reserves is an item irrelevant to "income" under any definition of that term. That is illustrated most graphically in the case of Massachusetts co-operative banks, whose required addition to guaranty fund is directly proportional to income. Mass. G.L. c. 170, §38. Thus, in that case, larger income results in a larger deduction and ultimately in a *smaller* tax.

Generally accepted accounting principles too support the view that such reserve additions are irrelevant to income. Thus, Accounting Research Bulletin (ARB) No. 43, Ch. 8, ¶12 provides:

> The following . . . should be excluded from the determination of net income under all circumstances:
>
> • • •
>
> (b)
>
> Amounts transferred to and from accounts properly designated as surplus appropriations, such as charges and credits with respect to general purpose contingency reserves.

SJC App. 106.

Finally, while "reserves" is listed among the bases of taxation enumerated in 12 U.S.C. §1464(h), the deduction for additions to reserves cannot be supported on that ground. The accumulated amount of reserves and the amount of required annual additions tend to be measures of opposites. While the former may perhaps be viewed as a measure of the strength or maturity of a financial institution, the latter, in contrast, are usually largest for new entities. To tax additions to reserves is to tax an absence or shortage of reserves themselves. Whatever Congress may have intended by authorizing taxation of reserves is unlikely to be achieved by taxing required additions thereto.

4. Lack of Comparable Standards.

Last, Section 11 is violative of 12 U.S.C. §1464(h) simply because it is defective in form. It provides for different and unequal measures of tax for the State and Federal institutions. The difference arises from the existence of different requirements for reserve additions for each type of thrift institution under §11. A second difference arises by reason of the earlier invalidation of the deposits portion of §11. For state institutions, the tax is measured by a deposits element and an income element. Federal associations, however, are taxed only on income, but at a greater rate.

It is of no consequence whether the statute is, as the Massachusetts Court described it, "wholly neutral." Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482. The presence or absence of discriminatory intent is not relevant under §1464(h). The use of different measures as the basis of tax inevitably produces differences in the taxes payable without the ability to make a valid comparison of relative tax burden. Section 1464(h) cannot be read to permit the use of separate measures which will inevitably produce unequal tax results. The concurrent use of one measure for Federal associations and a different measure for state-chartered institutions is not authorized. Such standards preclude direct comparison which appears to be at the heart of §1464(h), as interpreted by this Court in *Laurens,* in "unequivocally" barring discriminatory taxation.

Even if the state statute were wholly neutral in its use of separate standards for imposition of the tax, fortuitous comparative tax burdens on state and Federal institutions are not within the design of §1464(h). As stated in another case involving different measures of tax:

> If in a conceivable comparison between a domestic and a foreign corporation it should turn out that the foreign corporation paid no more or less than a domestic the result would be fortuitous; "the act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application."

Sneed v. *Shaffer Oil & Refining Co.,* 35 F.2d 21, 24 (8th Cir. 1929) (citation omitted). On this basis alone, the tax imposed by Section 11 of Massachusetts General Laws, Chapter 63, should be held to be beyond the scope of 12 U.S.C. §1464(h).

D. The Massachusetts Statute Violates the Commerce Clause by Its Failure to Provide for Apportionment of Income Derived from Other States.

In determining the "net operating income" which is the measure of the tax at issue here, the Massachusetts statute makes no provision for apportionment to in-state activities. Mass. G.L. c. 63, §11. During the period from 1966 to 1974, approximately 35% of the gross income of the Associations was derived from loans secured by real estate located outside Massachusetts. A. 134. By their very nature, such loans involve significant contacts with the states in which the mortgaged property is located. As will be indicated below, the Associations are thereby exposed to a real and substantial risk of multiple taxation.

The Commerce Clause of the United States Constitution grants to Congress the power ". . . [t]o regulate Commerce . . . among the several States . . . ." Article I, Section 8. This Court has described the purpose of that provision as ". . . to create an area of free trade among the several States." *McLeod* v. *J. E. Dilworth Co.,* 322 U.S.

327, 330 (1944). However, at least in modern times, it has also been clear that ". . . [e]ven interstate business must pay its way." *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U.S. 252, 259 (1919); *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 254 (1938). Balancing these two goals has been a "recurring problem" which this Court is here again asked to face. *See Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 166 (1954).

In striking such a balance, this Court has long held that a state is prohibited from imposing a tax on interstate commerce which could be imposed by other states touched by such commerce, thereby subjecting interstate commerce to cumulative burdens not imposed on purely local business. *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 255-256 (1938). A state tax which is not apportioned so as to reach only activities within the taxing state has been held to create a risk of such multiple taxation and to be therefore forbidden. *J. D. Adams Manufacturing Co.* v. *Storen,* 304 U.S. 307, 311-312 (1938); *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434, 439 (1939).

It is the risk of multiple taxation which has been so condemned, not merely its actual occurrence. As was noted in *Gwin, White & Prince,*

> Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden.

305 U.S. at 440. That conclusion is not only fair and sensible as a matter of theory; it is also the only interpretation which, in practical terms, will enable Federal associations to fulfill their "key role in the housing market," promoting "the national housing policy 'to provide for

the economical financing of home ownership . . . by facilitating to the extent possible the interregional flow of mortgage funds . . . ,' " *United States* v. *State Tax Commission,* 481 F.2d 963, 968 (1st Cir. 1973) (quoting chairman of Federal Home Loan Bank Board), and yet preserve the power of the states to impose on such interstate commerce a fair charge for benefits conferred. Requiring proof of actual multiple taxation in every case would result in a "first-come-first-tax" system unfair both to the states and to those engaged in commerce. As between two states each having a substantial nexus with a particular transaction, such a system would deprive the second state of power to tax, even if its connection with the income- producing activity were greater than that of the first state. Each sate would have an incentive to throw its taxing net as far and as high as possible, as well as a strong disincentive to lifting, lowering, or modifying a tax because of the risk of "losing its place in line." Further, such a system would result in a mass of litigation and a burdensome administrative problem for state taxing authorities. A single transaction may touch many states and the overall business activities of a company still more. State A's tax might have priority with respect to that of state B while being itself invalid if the tax of state C is applicable. As this Court once stated:

> The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment.

Freeman v. *Hewitt,* 329 U.S. 249, 256 (1946).

It is not suggested that a bare theoretical possibility of multiple taxation should always be sufficient to invalidate

a state tax. In a case involving *ad valorem* property taxation in which established principles for determining taxing situs appeared to support full taxation by the domiciliary state, this Court required an actual showing that some part of the property had acquired a taxing situs elsewhere to deprive the domiciliary state of the power to tax. *Northwest Airlines, Inc.* v. *Minnesota,* 322 U.S. 292, 295 (1944). Where a challenged tax on gross receipts or net income provides for a method of apportionment, multiple taxation can result only from some imprecision in the formula, and this Court then has required an actual showing of multiple taxation, stating: "*In this type of case* the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense." *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 463 (1959) (emphasis added).

An unapportioned tax, however, including one levied on or measured by net income, ". . . by its very nature makes interstate commerce bear more than its fair share." *Id.* at 462. In *General Motors Corp.* v. *Washington,* 377 U.S. 436 (1964), this Court refrained from passing on a claim of multiple taxation involving an unapportioned gross receipts tax, stating that it was adhering to the position taken in such cases as *Northwest Airlines* and *Northwestern States Portland Cement.* 377 U.S. at 449. That decision should not be interpreted as requiring proof of an actual multiple tax burden in every case. Both of the cases cited by the Court in *General Motors,* as described above, involved facts which gave rise to a presumption of the validity of the challenged tax and thus properly required proof of the contrary.

Further, the Court's refusal to pass on the multiple taxation claim in *General Motors* was not based on a lack of proof of multiple taxation; there was, in fact, apparently

proof that a St. Louis license tax did result in multiple taxation. *Id.* Rather, the Court described the defect in the taxpayer's case as a failure to demonstrate "what definite burden in a constitutional sense" had been placed on interstate commerce. *Id.* Thus, General Motors had failed to demonstrate that the challenged Washington tax would impede its interstate business. General Motors is part of an industry with primary manufacturing centers outside the state of Washington and thus is not in competition with local businesses able to benefit from whatever incremental tax burden might be placed on interstate business. Further, the state of Washington was the state of market in *General Motors.* The tax in question thus would be ultimately passed on to consumers resident in Washington and represented in the legislature which enacted or continued the tax rather than to out-of-state purchasers with no political remedy. In *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434 (1939), cited earlier for its holding that the mere risk of burdensome multiple taxation violated the Commerce Clause, *supra* at 62, this Court invalidated a tax similar to that involved in *General Motors* where the tax was applied to *outgoing* sales. The Court in *General Motors* did not overrule the *Gwin* case and, in fact, cited it in its opinion. 377 U.S. at 448.

Again, it is not suggested here that a mere theoretical possibility of multiple taxation must bar a state tax, even where unapportioned taxes are involved, though such taxes have been held to be inherently burdensome to interstate commerce. Even in such cases, Mr. Justice Rutledge noted, there might be instances in which there existed no real likelihood of multiple taxation. In *Freeman* v. *Hewitt,* he suggested that the proper test should be

> . . . whether those forbidden consequences would be produced, either through the actual incidence of mul-

> tiple taxes laid by different states or by the threat of them, with resulting uncertainties producing the same impeding consequences.

329 U.S. at 274 (Rutledge, J., concurring). A state tax would be invalidated only if the risk of multiple taxation were "real and substantial." *Id.* n.33. While such a test would result in a greater burden for litigants, it would not create the earlier described inequities, the flood of litigation, or the administrative burdens as would result from a requirement of proof of actual multiple taxation.

The risk of multiple taxation to which the Associations are exposed is "real and substantial." The Associations derive significant amounts of income from loans secured by real estate located outside Massachusetts. The business of Federal associations is such that their loans involve significant contacts with the state in which the mortgaged property is located. The security can be protected only by use of that state's facilities for recording of mortgages. Further, an extensive program of mortgage investment inevitably results in periodic foreclosures, usually requiring resort to the courts or administrative procedures of the state in which the property is located. Factual proof of a logical certainty ought not to be required. Such activities constitute a direct nexus between the Associations and the recording state which would justify that state's imposition of a tax.

In *Brady* v. *John Hancock Mutual Life Insurance Company*, —— Miss. ——, 342 So. 2d 295 (1977), the Supreme Court of Mississippi held that that state had jurisdiction to tax interest income of a non-resident corporation based upon the fact that the loans in question were secured by real estate within the taxing state and the security interests were recorded there, even in cases in which the non-resident had purchased mortgage loans from independent

contractors and had held and serviced them outside the state. This Court recently dismissed the appeal in the cited case. —— U.S. ——, 98 S. Ct. 32 (1977).

The possibility of such multiple taxation presents a real and substantial burden for interstate commerce in the instant case. Mortgage loans are not short-term transactions but generally extend for twenty-five to thirty years. Thus, each loan decision constitutes a long-term commitment by the lending institution which cannot be terminated in the event that a currently acceptable level of taxation is substantially increased. In recent years, more and more states, faced with spiraling governmental costs, have been forced to increase existing taxes and to seek new sources of tax revenues. There is no reason to think that this process will not continue or even accelerate. In that context, a Massachusetts tax lacking any apportionment provision creates for Federal associations domiciled in Massachusetts a strong disincentive against extraterritorial lending, since any tax imposed by the second state in the decades that follow will constitute a burden which could have been avoided by restricting business to Massachusetts. In effect, the possibility of such taxation results in ". . . such actual uncertainty that this uncertainty itself . . . constitute[s], in practical effect, a substantial clog" to interstate commerce. *Freeman* v. *Hewitt*, 329 U.S. at 274, n.33. (Rutledge, J., concurring).

That the risk of multiple taxation in this context poses a real and substantial threat to interstate commerce has been recognized by Congress, which in 1973 passed the State Taxation of Depositories Act to provide temporary relief from the threat of such taxation ". . . until such time as uniform and equitable methods are developed for determining jurisdiction to tax and for dividing the tax base among States." P.L. 93-100, §7, 87 Stat. 347 (1973). The

Act prohibited any state from imposing ". . . any tax measured by income or receipts or any other 'doing business' tax on any insured depository not having its principal office within such State." *Id.* A Federal savings and loan association is included in the definition of "insured depository." *Id.* The Act originally applied to taxable years beginning before January 1, 1976, but was extended to cover those years beginning before September 12, 1976. P.L. 94-222, §1, 90 Stat. 197 (1976). Thus, the protection provided by the Act has now expired, leaving the Associations again subject to the risk of multiple taxation.

Congressional concern over this problem has continued following the expiration of the Depositories Act. Senator Thomas McIntyre, Chairman of the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing, and Urban Affairs has introduced a bill which would establish a uniform jurisdictional standard and provide a detailed apportionment formula to govern situations in which more than one state has jurisdiction to tax. S. 1900, 95th Cong., 1st Sess. (1977). In hearings on this bill, there was testimony that approximately thirty states have legislation or regulations that could be used to tax out-of-state depository institutions on interstate transactions like those involved here, that actual taxation had been delayed only in anticipation of possible Congressional resolution of the issue, and that, absent such a resolution, such taxation would soon result. Hearings on S. 1900 (Senate Report not yet published), November 22, 1977, Statement of R. James Alerding on behalf of American Bankers Association. In the face of diverse rules and possible over-apportionment through non-uniform combination, it was predicted that many depository institutions would curtail loans across state lines or refrain from acquiring out-of-state mortgages. *Id.*, Statement of C. James Judson on behalf of American Bankers Association.

That Congress has expressed such concern regarding state taxation of Federally-chartered financial institutions indicates the magnitude of this continuing threat to the free flow of funds among the states. While Congress could remove the threat by legislation, it has not done so yet. Further, while the State Taxation of Depositories Act provided protection during certain of the years since passage of Massachusetts General Laws, Chapter 63, Section 11, others were not reached by that statute. In summary, the Massachusetts tax has placed on the Associations a real and continuing burden to the extent they wish to engage in interstate commerce, as authorized by their Federal charters.

The Massachusetts Court conceded that §11 fails to make any attempt to distinguish between income received from activities within the State and income from activities outside the State. Mass. Adv. Sh. (1977) at 907, 363 N.E. 2d 474, 481. The Court further acknowledged that ". . . *collectively* the associations invest a substantial portion of their funds (about 29% in 1974) in mortgage loans secured by real estate located in other States," but upheld the statute on the ground that "the record is devoid of any information with respect to the contacts of any *individual* Federal savings and loan association in any other jurisdiction." *Id.* at 907-908, 363 N.E. 2d 474, 482 (emphasis added). This distinction between the collective and individual activities of the Associations is without substance here. A significant number of individual associations must necessarily be in the business of making out-of-state real estate loans if nearly a third of the Associations' collective assets are invested in such loans.

As noted earlier, it as a real and substantial risk of multiple taxation which should be held to violate the Commerce Clause. The activities of individual institutions are

relevant only as one indication of the magnitude of that risk. Federal associations border on all five states adjoining Massachusetts, and all Federal associations have the power to make direct mortgage loans outside Massachusetts. 12 U.S.C. §1464(c). Over $300,000,000 of revenues were received by the Associations from out-of-state sources between 1966 and 1974. A. 134. Thus, it is clear that there is potential risk for all of the Associations and that a clear and present risk already exists for many as to a significant portion of their investments. The identity of the individual institutions in the latter category is hardly relevant, especially in a declaratory action such as this.

E. The Massachusetts Statute Violates the Due Process Clause by Its Failure to Provide for Apportionment of Income Derived from Other States and by Its Use of Separate and Unequal Standards for Measuring Deductions.

During the period from 1966 to 1974, approximately 35% of the gross income of the Associations was derived from loans secured by non-Massachusetts real estate. A. 134. The failure of Chapter 63, Section 11 of the Masachusetts General Laws to provide a mechanism for apportioning income from such transactions among the states violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." Corporations are "persons" protected by this provision. *Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania,* 125 U.S. 181, 189 (1888). It follows that a state may not compel a corporation to pay taxes without due process.

The most commonly cited formulation of the Due Process standard as applied to state taxation of multi-state business is this Court's statement that a state may not utilize a method of taxation which ". . . operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction." *Hans Rees' Sons, Inc.* v. *North Carolina,* 283 U.S. 123, 134 (1931). As this Court later explained:

> . . . a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere.

Connecticut General Life Insurance Co. v. *Johnson,* 303 U.S. 77, 80-81 (1938).

The Due Process Clause does not prohibit all taxation of income arising from out-of-state business transactions. It has long been established that such income may be included in the measure of a tax so long as it is properly apportioned among the states related to the transactions which gave rise to the income. In response to an argument that formula apportionment violated the Fourteenth Amendment by taxing, directly or indirectly, income arising from out-of-state business activities, this Court stated:

> The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States . . . . The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of appor-

> tionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State .... There is ... nothing in this record to show that the method of apportionment adopted by the State was inherently arbitrary, or that its application to this corporation produced an unreasonable result.

Underwood Typewriter Company v. *Chamberlain,* 254 U.S. 113, 120-121 (1920).

Like the transactions involved in the *Underwood Typewriter* case, the Associations' activities in making mortgage loans secured by non-Massachusetts real estate relate not just to the taxing state but to another state as well, in this case the state in which the mortgaged property is located. For Massachusetts to impose on the Associations a tax measured directly or indirectly by their income without apportioning it in any way is "inherently arbitrary," in the words of the *Underwood Typewriter* opinion. The full burden of an unapportioned tax such as this falls on all income of the taxpayer, whether or not attributable to transactions within the taxing state. Thus, proof of any out-of-state income satisfies the taxpayers' burden, described in *Butler Brothers* v. *McColgan,* 315 U.S. 501, 507 (1942), of showing that extraterritorial values are being taxed.

Section 11 also violates the Due Process Clause in a second way. While, on its face, the statute appears to treat State-chartered banks and Federal associations equally, in operation it makes a distinction which is arbitrary, unreasonable and much to the detriment of the Federal associations. The reserve deductions allowed State-chartered banks are determined by the legislature and have remained fixed since the statute was enacted in 1966. The reserve deduction allowed Federal associations is determined by

Congress and the Federal Savings and Loan Insurance Corporation and has been repeatedly adjusted to reflect goals wholly unrelated to tax considerations. See discussion *supra* at 24-25.

The statute thus distinguishes between the Federal associations and State-chartered cooperative and savings banks despite the fact that they are "similar" for purposes of 12 U.S.C. §1464(h). *United States* v. *State Tax Commission,* 481 F.2d 963, 968 (1st Cir. 1973). The use of totally different methods for computing the same deduction for members of the same class under the same tax statute violates the due process requirement of *International Shoe Co.* v. *Washington,* 326 U.S. 310, 319 (1945), that economic regulation not be "unreasonable, arbitrary or capricious."

F. The Use of Separate and Unequal Standards for Measuring Deductions Violates the Equal Protection Clause.

As indicated in the discussion of the Due Process Clause in Part E of this brief, Massachusetts General Laws, Chapter 63, Section 11, provides different methods of computing the deduction for reserve additions in the case of Federal associations, on the one hand, and Massachusetts-chartered savings and cooperative banks on the other. The result has been consistently lower deductions for the Federal institutions. Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482; A. 16-132. Federal associations have been held to be similar to such State-chartered banks for purposes of 12 U.S.C. §1464(h). *United States* v. *State Tax Commission,* 481 F.2d 963, 968 (1st Cir. 1973). Application of different measures for the deduction in question violates the requirement of the Equal Protection Clause of the Fourteenth Amendment that a law must apply equally to

all those within appropriate classifications. *See, e.g., McLaughlin* v. *Florida,* 379 U.S. 184, 190 (1964).

Conclusion.

For the foregoing reasons, the tax imposed on "net operating income" by Massachusetts General Laws, Chapter 63, Section 11(a)(1) and (b)(1), should be held to be invalid as applied to Federal savings and loan associations, and the decision of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted,

CHESTER M. HOWE,
MAXWELL D. SOLET,
OLIVER W. STALTER,
GASTON SNOW & ELY BARTLETT,
One Federal Street,
Boston, Massachusetts 02110.
(617) 426-4600
Attorneys for the Appellants.

CORRECTED COPY

Supreme Court, U.S.
FILED
FEB 17 1978
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON ET AL.,
APPELLANTS,

v.

STATE TAX COMMISSION ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief for Appellees.

FRANCIS X. BELLOTTI,
Attorney General,
S. STEPHEN ROSENFELD,
Assistant Attorney General,
JOHN E. BOWMAN, JR.,
Assistant Attorney General,
MARGOT BOTSFORD,
Assistant Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.

BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

Table of Contents.

Questions presented for review 1

Statement of the case 2

Prior proceedings 2

Statement of facts 3

Summary of argument 7

Argument 10

I. The statute's deduction from gross income for required additions to an institution's guaranty fund does not violate 12 U.S.C. § 1464(h), because it is a fair, neutral, and nondiscriminatory measure which imposes no competitive disadvantage on the federal associations. 10

II. The exemption of Massachusetts credit unions from the challenged tax is consistent with the provisions of 12 U.S.C. § 1464(h), and does not serve to invalidate the tax. 22

A. Introduction 22

B. Congressional taxing policy governing credit unions and the legislative history of § 1464(h) both indicate that credit unions are not "similar" institutions within the scope of § 1464(h). 24

1. Congressional taxing policy 24

2. The legislative history of § 1464(h) 26

C. The purposes, powers and operation of Massachusetts credit unions as reflected in this record demonstrate the absence of similarity between credit unions and the associations. 30

1. Statutory purposes and powers 30

2. Actual operation of credit unions 34

III. The type of tax chosen by the Massachusetts Legislature — a franchise tax measured by income — is authorized by 12 U.S.C. § 1464(h). 37

IV. The associations' Commerce Clause argument lacks supporting evidence and is contradicted by the fundamental principle that a domiciliary corporation must share the costs of state government. 40

V. The associations' due process and equal protection claims are insubstantial. 45

Conclusion 47

Statutory appendix 49

Table of Authorities Cited.

CASES.

Amoskeag Savings Bank v. Purdy, 231 U.S. 373 (1913) 17

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1932) 27n

Bank of Redemption v. City of Boston, 125 U.S. 60 (1888) 15, 34n

Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924) 37n

Brady v. John Hancock Mut. Life Ins. Co., ___ Miss. ___, 342 So. 2d 295 (1977), app. dism'd, ___ U.S. ___, 98 S. Ct. 32 (1977) 44n, 45n

Butler Brothers v. McColgan, 315 U.S. 501 (1942) 39n

Carmichael v. Southern Coal Co., 301 U.S. 495 (1937) 39, 47

Central Railroad Co. v. Pennsylvania, 370 U.S. 607 (1962) 44, 46

Cluett v. Illinois, 356 U.S. 571 (1958) 35

Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975) 39n, 42n

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 40n, 42n, 44

Dandridge v. Williams, 397 U.S. 471 (1970) 19n

Data Processing Service v. Camp, 397 U.S. 150 (1970) 38n

Davenport Bank v. Davenport Board of Equalization, 123 U.S. 83 (1887) 13n

Doyle v. Mitchell Brothers Co., 247 U.S. 179 (1918) 39

Educational Films Corp. v. Ward, 282 U.S. 379 (1931) 37n

Erlenbaugh v. United States, 409 U.S. 239 (1972) 27n

Ferguson v. Skrupa, 372 U.S. 726 (1963) 11n

First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339 (1968) 14n, 29

First Fed. Sav. & Loan Ass'n v. Connelly, 142 Conn. 483, 115 A. 2d 455 (1955), app. dism'd, 350 U.S. 927 (1956) 33, 34

First Fed. Sav. & Loan Ass'n v. State Tax Commission, ___ Mass. ___, Mass. Adv. Sh. (1977) 895, 363 N.E. 2d 475 (1977) passim

First Nat'l Bank v. Anderson, 269 U.S. 341 (1926) 19n

First Nat'l Bank v. Louisiana Tax Comm'n, 289 U.S. 60 (1933) 36

First Nat'l Bank of Hartford v. City of Hartford, 273 U.S. 548 (1927) 18

First Nat'l Bank of Wellington v. Chapman, 173 U.S. 205 (1899) 11, 15, 18
General Motors Corp. v. Washington, 377 U.S. 436 (1964) 41n, 42, 43, 44, 45n
Gurley v. Rhoden, 421 U.S. 200 (1975) 37n
Harrison v. Northern Trust Co., 317 U.S. 476 (1963) 26n
Hawley v. City of Malden, 232 U.S. 1 (1914) 44n
Hedgebeth v. North Carolina, 334 U.S. 806 (1948) 35
Ivan Allen Co. v. United States, 422 U.S. 617 (1975) 39n
Kokoszka v. Belford, 417 U.S. 642 (1974) 24
La Caisse Populaire Ste. Marie v. United States, 563 F. 2d 505 (1st Cir. 1977) 34
Laurens Fed. Sav. & Loan Ass'n v. South Carolina Tax Comm'n, 365 U.S. 517 (1961) 12, 15n, 25, 26
Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932) 41, 46
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 46, 47
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) 19n
Macallen Co. v. Massachusetts, 279 U.S. 620 (1929) 37n
Madden v. Kentucky, 309 U.S. 83 (1940) 47
Manchester Fed. Sav. & Loan Ass'n v. State Tax Comm'n, 105 N.H. 17, 191 A. 2d 529 (1963) 34
Matson Navigation Co. v. State Bd. of Equalization of Calif., 297 U.S. 441 (1936) 42
McCulloch v. Maryland, 4 Wheat. 316 (1819) 14n
Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942) 41
Mercantile Bank v. New York, 121 U.S. 138 (1887) 15, 34n

Michigan Nat'l Bank v. Michigan, 365 U.S. 467 (1961) 11, 12, 13, 15, 17, 21, 34n et seq.
Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954) 45n
Monroe v. Pape, 365 U.S. 167 (1961) 29
Moody v. Albemarle Paper Co., 417 U.S. 622 (1974) 29, 30
Muniz v. Hoffman, 422 U.S. 454 (1975) 24, 30
National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967) 45n
National Geographic Society v. California Bd. of Equalization, 430 U.S. 551 (1977) 45n
National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967) 26n, 27n
New Haven Inclusion Cases, 399 U.S. 392 (1970) 35
Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 40n, 42, 43n, 46
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 42, 44
Norton Co. v. Department of Revenue, 340 U.S. 534 (1951) 37n, 43
Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664 (1899) 14n
People v. Weaver, 100 U.S. 539 (1879) 15
Perry v. Commerce Loan Co., 383 U.S. 392 (1966) 25
Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252 (1919) 42
Railroad Co. v. Commissioners, 103 U.S. 1 (1880) 14n
Shaffer v. Carter, 252 U.S. 37 (1920) 43
Sierra Club v. Morton, 405 U.S. 727 (1972) 38n

South Carolina State Highway Dept. v. Barnwell Brothers, Inc., 303 U.S. 177 (1938) 19n
Standard Oil Co. v. Peck, 342 U.S. 382 (1952) 40n, 44
State v. Minnesota Fed. Sav. & Loan Ass'n, 218 Minn. 229, 15 N.W. 2d 568 (1944) 34
Tidewater Oil Co. v. United States, 409 U.S. 151 (1972) 26n
Tradesmens Nat'l Bank v. Oklahoma Tax Comm'n, 309 U.S. 560 (1940) 11, 13n, 17n, 18, 36
Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) 42
Union Nat'l Bank of Clarksburg v. Home Loan Bank Board, 233 F. 2d 695 (D.C. Cir. 1956) 27n
United States v. American Trucking Ass'ns, Inc., 310 U.S. 534 (1940) 25
United States v. Bacto-Unidisk, 394 U.S. 784 (1969) 29
United States v. City of Detroit, 355 U.S. 466 (1958) 14n
United States v. Cooper Corp., 312 U.S. 600 (1941) 27n
United States v. County of Fresno, 429 U.S. 452 (1977) 14n
United States v. Kirby Lumber Co., 284 U.S. 1 (1931) 39
United States v. State Tax Comm'n, 348 F. Supp. 397 (D. Mass. 1972), aff'd and modified, 481 F. 2d 963 (1st Cir. 1973) 4, 34
United States v. State Tax Comm'n, 481 F. 2d 963 (1st Cir. 1973) 4, 5n, 12n, 16, 20, 21, 38n
United States Glue Co. v. Oak Creek, 247 U.S. 321 (1918) 42
Washington v. Davis, 426 U.S. 229 (1976) 19n

Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) 42n, 44
Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) 41n
Wisconsin v. Minnesota Mining Co., 311 U.S. 452 (1940) 42

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution
Commerce Clause 2, 6, 7, 9, 19n, 37n, 40 et seq.
Fourteenth Amendment
Due Process Clause 2, 6, 37n, 45
Equal Protection Clause 2, 6, 37n, 45
12 U.S.C. (1970 and Supp. V 1975)
§ 548 12, 13n, 14, 15, 34n, 38n
§ 1421 29
§§ 1421-1449 3
§ 1423 29
§ 1424 29
§ 1433 15n
§§ 1461-1468 3, 26
§ 1464(a) 26, 27n, 32
§ 1464(b) 32n
§ 1464(c) 32, 33, 42
§ 1464(d) 32n
§ 1464(e) 26n, 27, 28n, 32n
§ 1464(f) 29, 32n
§ 1464(h) 2, 5, 6, 7, 8, 9, 10 et seq.
§ 1464(i) 32n
§ 1464(k) 32n
§ 1465 27

§§ 1724-1730c 3
§ 1726(b) 5n
§§ 1751-1790 28
§ 1752a 29
§§ 1753-1756 29
§ 1757 28n
§ 1766 29
§ 1768 22n

28 U.S.C. § 1257(2) (1970) 2

Act of October 20, 1951, c. 521, Title III, § 313(d), 65 Stat. 490 24n

Act of October 16, 1962, Pub. L. 87-834, § 6(e)(1), 76 Stat. 984 24n

Act of August 3, 1976, Pub. L. 94-375, § 22, 90 Stat. 1078 32

Federal Credit Union Act of 1934, 48 Stat. 1216 28, 29
§ 2 29
§ 7 28n
§ 16 29

Home Owners' Loan Act of 1933, c. 64, §§ 1-9, 48 Stat. 128 13n, 26, 27n, 28
§ 5(a) 26
§ 5(e) 26n
§ 5(h) 5, 12, 24n
§ 6 27n

Pub. L. 91-156, § 2(a), 83 Stat. 434 13n

M.G.L. c. 14, § 2 (West Supp. 1977) 2n

M.G.L. c. 59 (West 1973 and Supp. 1977) 25n

M.G.L. c. 63 (West Supp. 1977)
§ 11 4, 5, 6, 8, 9, 10, 11 et seq.
§ 11(a)(1) 2, 3, 4n, 5, 8
§ 11(a)(2) 4, 5, 12n

§ 11(b)(1) 2, 3, 4n, 5, 8
§ 11(b)(2) 4, 5, 12n

M.G.L. c. 64D, § 1 (West 1969) 25n

M.G.L. c. 64H, § 2 (West Supp. 1977) 25n

M.G.L. c. 64I, § 2 (West Supp. 1977) 25n

M.G.L. c. 93, § 34 (West Supp. 1977) 4n

M.G.L. c. 168, § 58 (West 1971) 6n

M.G.L. c. 170, § 38 (West 1971) 6n

M.G.L. c. 171 (West 1971 and Supp. 1977)
§ 2 23n, 31
§ 7 31
§ 7(c) 31n
§ 8 31n
§ 9 31n
§ 10 33n
§ 13 32
§ 15 32
§ 16 32
§ 18 32
§ 21 32
§§ 24(a)-(g) 31
§ 24(a) 31n, 33n
§ 24(b) 31n, 33
§ 25 32

M.G.L. c. 231A, § 1 (West Supp. 1977) 2

Mass. Stat. 1909, c. 419 22n

Mass. Stat. 1926, c. 273, § 24 32

Mass. Stat. 1966, c. 14
§§ 1-4 3n
§ 11 3

Mass. Stat. 1971, c. 555, §§ 26, 27 3n
Mass. Stat. 1975, c. 684, § 44 3n
Mass. Stat. 1977, cs. 15, 19, 20-24 33n
Conn. Stat. Ann. Tit. 36-196 (West Supp. 1978) 31n
N.H. Rev. Stat. Ann. § 394:5 (1968 Replacement Ed.) 31n
R.I. Gen. Laws § 19-21-5M (Bobbs-Merrill 1976) 31n

RULES AND REGULATIONS.

12 C.F.R. (1977)
§ 500.3 32n
§§ 541.1-556.9 32n
§ 544.1 20
§ 545 32n
§ 563.13(a)(1) 6n
35 Fed. Reg. 4044 (March 4, 1970) 20
Internal Revenue Code
§ 11, subchapter H 24
§ 501(c)(14)(A) 22n, 24
§ 3112 22n
§ 3305 22n
Massachusetts Rules of Appellate Procedure, Rule 18, 365 Mass. 844, 864 (1974) 35n
Supreme Court Rule 36 35

LEGISLATIVE MATERIALS.

77 Congressional Record
2429 13n
2474-2507 13n, 26

2479 26, 28
2480 27
2481 28
2483-2486 28
2567-2588 13n
2579 27
3206 28
4930 13n
4974 13n
4987 28
4995 13n
7259 28
7259-7261 28
12218 28
12218-12226 28
12223 28
12224-12225 28
H.R. Rep. No. 55, 73d Cong., 1st Sess. (1933) 13n, 26n
H.R. Rep. No. 210, 73d Cong., 1st Sess. (1933) 13n
Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., Report of the President's Commission on Financial Structure and Regulation (December, 1972) Including Recommendations of the Department of the Treasury (Comm. Print 1973) 29n, 30n
S. Rep. No. 91, 73d Cong., 1st Sess. (1933) 26n
S. Rep. No. 91-530, 91st Cong., 1st Sess., reprinted in [1969] U.S. Code Cong. & Ad. News 1594 13n, 14n

MISCELLANEOUS.

[1976] Credit Union Guide (Prentice-Hall) 25n

Hellerstein, State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication, 75 Mich. L. Rev. 1426 (1977) 14n

[1968] Mass. Comptroller's Report, Mass. Pub. Doc. 140 (1969), abstracted in Mass. H.R. No. 500 (1969) 17n

[1970] Mass. Comptroller's Report, Mass. Pub. Doc. 140 (1971), abstracted in Mass. H.R. No. 500 (1971) 17n

[1976] Mass. Comptroller's Report, Mass. Pub. Doc. 140 (1977), abstracted in Mass. H.R. No. 500 (1977) 17n

Snider, J.L., Credit Unions in Massachusetts (1939) 22n, 23n, 31n, 32

Surrey, S., and Warren, W., The Income Tax Project of the American Law Institute: Gross Income, Deductions Accounting, Gains and Losses, Cancellation of Indebtedness, 66 Harv. L. Rev. 761 (1953) 39n

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON ET AL.,
APPELLANTS,

v.

STATE TAX COMMISSION ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief for Appellees.

Questions Presented for Review.

1. Does a state tax statute discriminate against federal savings and loan associations when it permits both the state and federal institutions subject to the tax to deduct from gross income the additions which both are required by law to make to their guaranty funds?

2. Are credit unions "similar" to federal savings and loan associations under the standards of 12 U.S.C. § 1464(h) (1970)?

3. Does 12 U.S.C. § 1464(h) forbid states from imposing on federal savings and loan associations a franchise tax measured by income?

4. Does the Commerce Clause prohibit a domiciliary state from taxing federal savings and loan associations solely on the ground that a portion of the associations' income derives from real estate loans secured by out-of-state property?

5. Has Massachusetts violated either the Due Process or Equal Protection Clause of the Fourteenth Amendment, by its method of taxing federal savings and loan associations?

Statement of the Case.

Prior Proceedings.

This appeal is brought under 28 U.S.C. § 1257(2) (1970) from a decision of the Supreme Judicial Court of Massachusetts upholding a state taxing statute, M.G.L. c. 63, §§ 11(a)(1) and (b)(1) (West Supp. 1977), against state and federal constitutional challenges to its validity.

The suit was initiated in the state Superior Court on April 16, 1975, by the thirty-four federally chartered savings and loan associations located in Massachusetts ("appellants" or "the associations"); it sought a declaratory judgment under M.G.L. c. 231A, § 1 (West Supp. 1977), against the state Commissioner of Corporations and Taxation and the members of the State Tax Commission[1] ("appellees").

[1]The Commissioner of Corporations and Taxation sits as one of the three members of the Commission, M.G.L. c. 14, § 2 (West Supp. 1977). He was thus sued in both capacities.

On December 24, 1975, after completion of pleadings and discovery, the parties filed a stipulation of facts (Appendix ["A."] 10-144), and moved separately for summary judgment. Upon joint request of the parties, the case was reported without decision to the state Appeals Court (A. 4). The Supreme Judicial Court subsequently granted direct appellate review (A. 5).

The Supreme Judicial Court issued its decision upholding the statute on May 3, 1977.

Statement of Facts.

The appellants are federal mutual savings and loan associations chartered under the provisions of 12 U.S.C. §§ 1461-1468 (1970 and Supp. V. 1975); they all have their home offices in Massachusetts, and the record discloses no branch offices outside Massachusetts. They are members of the Federal Home Loan Bank System, 12 U.S.C. §§ 1421-1449 (1970 and Supp. V. 1975), and are insured by the Federal Savings and Loan Insurance Corporation, 12 U.S.C. §§ 1724-1730c (1970 and Supp. V. 1975) (A. 11).

The challenged statutory provisions, M.G.L. c. 63, §§ 11(a)(1) and (b)(1), were enacted in substantially their present form in 1966. Mass. Stat. 1966, c. 14, § 11.[1] Sections 11(a)(1) and (b)(1) impose on state-chartered savings and cooperative banks[2] and federal savings and loan

[1]Section 11 was one part of a major tax revision bill which, as a principal feature, introduced the sales tax to Massachusetts. Mass. Stat. 1966, c. 14, §§ 1-4. The statute has been amended since 1966, but the amendments do not affect the substance of this case. *See* Mass. Stat. 1971, c. 535, §§ 26, 67; Mass. Stat. 1975, c. 684, § 44.

[2]Section 11 also applies to state savings and loan associations. There is apparently only one such association with a Massachusetts charter.

associations located in Massachusetts a tax totaling 1.254 per cent of "net operating income";[4] that term is defined in § 11 as gross income from all sources, less (1) "operating expenses," (2) "net losses" allocable to the taxable year, and (3) "minimum additions . . . to [the taxpayer's] guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities."

As enacted, M.G.L. c. 63, § 11, also imposed a tax on the deposits of the state banks and federal associations. M.G.L. c. 63, §§ 11(a)(2) and (b)(2). These deposits tax provisions were challenged by the United States in a separate case brought in federal court and were found invalid. *United States* v. *State Tax Comm'n*, 481 F. 2d 963 (1st Cir. 1973), *aff'g and modifying* 348 F. Supp. 397 (D. Mass. 1972). The deposits tax, *inter alia*, permitted a deduction from taxable deposits for all unpaid balances on loans secured by mortgages of real estate located within fifty miles of the taxpayer's main office. Since federal associations are permitted by Congress to make loans secured by real estate within a one-hundred-mile radius of the main office, while state banks are limited to a fifty-mile lending radius, the fifty-mile deduction was held to discriminate against the federal associations in such a way as to discourage lending for home building purposes throughout the full area intended by Congress. 481 F. 2d at 970. As a result of the judgment entered in federal court, Massachusetts refunded to the federal savings and loan associations all taxes collected under §§ 11(a)(2) and (b)(2).[5]

Thus, when the present case arose, federal savings and loan associations were paying a tax assessed only on net operating income, while the state institutions were paying both an income and deposits-based tax. The associations nonetheless contended that the income-based tax in M.G.L. c. 63, §§ 11(a)(1) and (b)(1) ("§ 11"), discriminated against them, in violation of § 5(h) of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(h) (1970) ("§ 1464(h)").

The associations' principal federal claim[6] related to the deduction for required minimum additions to guaranty funds under § 11. The federal savings and loan associations, since 1970, have been obliged by federal regulation to set aside a smaller percentage of assets for this purpose[7]

See M.G.L. c. 93, § 34 (West Supp. 1977). The parties did not raise any issues concerning state savings and loan associations in state court, and none are presented in this appeal.

[4] The income-based portion of the tax is levied in two steps. Section 11(a)(1) requires a tax of 0.627 per cent of estimated net operating income to be paid on the 25th day of the seventh month of the taxable year. Subsequently, on the 25th day of the month following the close of the taxable year, § 11(b)(1) requires payment of 1.254 per cent of actual net operating income, minus the estimated tax paid under § 11(a)(1).

[5] Six federal savings and loan associations intervened in the deposits tax challenge, and added, as their own independent cause of action, an attack on §§ 11(a)(1) and (b)(1) which was substantially the same as the one now before this Court. The district court, which had held the deposits tax invalid, upheld §§ 11(a)(1) and (b)(1). 348 F. Supp. at 400-401. The circuit court vacated the district court judgment on the procedural ground that the claim should first have been brought in the state courts. 481 F. 2d at 972-974.

[6] There were state statutory claims as well. *See* Jurisdictional Statement, 32-35, Mass. Adv. Sh. (1977) at 900-904, 363 N.E. 2d at 478-480.

[7] The associations' guaranty fund requirement arises as a condition to obtaining insurance from the Federal Savings and Loan Insurance Corporation. 12 U.S.C. § 1726(b). The amount of the requirement lies within the Corporation's judgment, exercised through regulations, "but such regulations shall require the building up of reserves to 5 per centum of all insured accounts within a reasonable period, not exceeding twenty years . . .." The Corporation may extend the twenty-year limitation by ten years if it deems the extension necessary to meet mortgage needs. The Corporation has not extended the period. It has set the rate of

than state law demands from state savings and cooperative banks.[5] Their deduction under § 11 was therefore also smaller, and this, they claim, represented discrimination forbidden by § 1464(h). Further, the appellants sought to invalidate § 11 because credit unions are not subject to the tax. They claimed that the credit unions are "similar" to federal savings and loan associations within the meaning of § 1464(h), and the exclusion of credit unions from § 11 was therefore discriminatory. The appellants also claimed that the type of tax imposed by § 11 was not among those authorized by Congress in § 1464(h).

Appellants offered three constitutional grounds for invalidating § 11, all similar in substance to one another. On account of the state's failure to exclude income derived from real estate loans secured by out-of-state property, the statute was alleged to violate the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The Supreme Judicial Court found the state statute valid. It held that:

---

additions to the fund at 1/4 of 1 per cent of account balances per year, or 1/20 of the total requirement. After twenty years, the further additions are a reflection of the increase in the total value of the association's accounts. 12 C.F.R. § 563.13(a)(1) (1977).

[5]The guaranty fund requirements for savings banks are found in M.G.L. c. 168, § 58 (West 1971). The total requirement is 7½ per cent of deposits, except that the trustees may elect to transfer money to surplus, rather than the guaranty fund, if the fund amounts to at least 5 per cent of deposits. The guaranty fund is held to meet losses in the business of the savings banks.

The guaranty fund requirements for cooperative banks, found at M.G.L. c. 170, § 38 (West 1971), are also used to meet business losses as well as for "changes in assets, or to establish reserves therefor." The requirement totals 10 per cent of total assets, rather than of deposits. The required additions are 5 per cent of net profits "at each distribution date."

1. The deduction for required additions to guaranty funds is not discriminatory under the terms of 12 U.S.C. § 1464(h), since "[t]he excise statute is wholly neutral." Moreover, the deduction did not frustrate the purposes of § 1464(h), because it was not shown to create a substantial competitive disadvantage for the associations. Jurisdictional Statement ("J.S.") 40, Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482.

2. Massachusetts credit unions are not "similar" to federal savings and loan associations in purpose, structure, or actual practice. J.S. 43, Mass. Adv. Sh. (1977) at 913, 363 N.E. 2d at 484.

3. "The excise imposed by G.L. c. 63, § 11, is a franchise tax," measured by income. As such, it falls within the categories of tax explicitly listed in § 1464(h), and cannot be deemed unauthorized by Congress. J.S. 36, Mass. Adv. Sh. (1977) at 904, 363 N.E. 2d at 480.

4. The associations' Commerce Clause attack failed because (a) they had not shown "the extent of the contacts of any association with any other State," and (b) their assertions about multiple taxation were speculative and unfounded. J.S. 38, 39, Mass. Adv. Sh. (1977) at 907, 908, 363 N.E. 2d at 481, 482.

5. The due process and equal protection claims were without merit. J.S. 40, Mass. Adv. Sh. (1977) at 910, 363 N.E. 2d at 482.

Summary of Argument.

Appellants' principal claims arise under 12 U.S.C. § 1464(h). This statute reflects a Congressional policy decision that states should be empowered to tax federal

savings and loan associations so long as the tax does not favor state banking institutions which are in competition with them. The judicial inquiry required by § 1464(h) has two major parts: (1) whether the state taxes the state and federal institutions in substantially equal measure and (2) whether, as required by § 1464(h), the tax includes all state institutions "similar" to federal savings and loan associations.

In argument I appellees show that the challenged excise provisions, M.G.L. c. 63, §§ 11(a)(1) and (b)(1), are neutral on their face and in their practical effect. The deduction in § 11 for each institution's minimum required additions to its guaranty fund is designed to recognize that such payments deserve to be offset against income. It does not unfairly distinguish between appellants and their state counterparts. Nor have appellants offered any proof that their guaranty fund requirements actually result in a pattern of disparate tax impact. In fact, the maximum impact of the guaranty fund deduction is quite small. At bottom, appellants are attempting to exempt themselves from state taxation under § 11 altogether, on the ground that the guaranty fund deduction does not achieve mathematical equality between federal and state institutions. Section 1464(h) does not demand such rigidity. The appellants must pay their fair share in supporting the costs of state government. (Pp. 10-21.)

The second argument shows that the exclusion of Massachusetts credit unions from the tax imposed by § 11 does not violate § 1464(h), since credit unions are not "similar local mutual or cooperative thrift and home financing institutions." The purposes of federal associations and credit unions are different. The federal associations were created to provide home financing. Credit unions, in

contrast, enable persons of moderate means to pool their limited savings and obtain personal loans at low interest.

Massachusetts' tax policy on credit unions mirrors that of Congress; it exempts federal and state credit unions from corporate taxation at the same time it taxes federal savings and loan associations and state cooperative and savings banks. Section 1464(h) should not be read to prohibit states from adopting the same framework for taxation that Congress itself espouses. Moreover, the legislative history of § 1464(h) confirms that Congress did not consider credit unions to be "similar." If federal savings and loan associations believe that credit unions ought to be taxed in the same manner as they, their argument is properly directed to Congress, not this Court. (Pp. 22-29.)

Finally, an analysis of the record shows that credit unions actually operate differently and at a far more modest level than appellants. Their activities are thus not similar. (Pp. 30-36.)

Argument III shows that the tax imposed by § 11, a franchise tax measured by income, is authorized by Congress. Section 1464(h) includes "franchise" taxes in its terms, and the use of net income to measure the value of the franchise is well-accepted by the Court. Moreover, contrary to appellants' argument, the determination of which deductions ought to be included in determining "net income" is not a question for the Court but a classic policy issue for the state Legislature. (Pp. 37-39.)

The fourth argument addresses appellants' Commerce Clause claim. Appellants are domiciled in Massachusetts, and all their income-producing activity is centered in Massachusetts. Under these facts, the Commonwealth's tax on the associations' franchise does not raise a serious Commerce Clause question, even assuming appellants' activities have substantial interstate connections. What is

more, appellants have failed to establish the interstate nature of their business. Their claims of multiple taxation are therefore speculative, and their Commerce Clause claim without merit. (Pp. 40-45.)

The fifth and final argument treats appellants' due process and equal protection claims. The arguments advanced for both were long ago disposed by this Court as insubstantial. (Pp. 45-47.)

Argument.

I. The Statute's Deduction from Gross Income for Required Additions to an Institution's Guaranty Fund does Not Violate 12 U.S.C. § 1464(h), Because it is a Fair, Neutral, and Nondiscriminatory Measure which Imposes No Competitive Disadvantage on the Federal Associations.

The tax imposed on appellants by § 11 is sound in policy and evenhanded in operation. The associations' challenge focuses on the statutory deduction from gross income for "minimum additions during the taxable years to [the taxpayer's] guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities." State and federal institutions are all obliged to set aside a specified portion of their funds for this purpose as a contingency to meet business losses.[9] Each institution is disadvantaged in its profit-making activities to the degree that it

[9] The guaranty funds of federal savings and loan associations, savings banks and cooperative banks are described above. See pp. 5-6, nn. 7, 8, *supra*.

must take these funds out of circulation. Hence, the Massachusetts Legislature's decision to eliminate additions to the guaranty fund from taxable "net operating income" under § 11 is plainly rational.[10]

The appellants' claim of discrimination under the standards of § 1464(h) is without merit. The statute on its face treats all taxed institutions identically, and the differing guaranty fund requirements do not unfairly differentiate the associations from their state counterparts. Indeed, the associations offer no evidence that their actual tax burden is any greater than the state institutions', as measured by income, deposits, assets, or any other standard. This failure of proof is fatal; it disregards the Court's admonition that when a taxpayer seeks to show discrimination on account of a "greater" tax, the amount of the tax itself is the starting point. *E.g.*, *Michigan Nat'l Bank* v. *Michigan*, 365 U.S. 467, 478-479 (1961); *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n*, 309 U.S. 560, 567 (1940).

In the place of proof appellants seek to erect a rigid standard of undeviating equality as the measure of the tax's validity. They assert that because the federally-set rate of guaranty fund additions for the associations is currently, and fortuitously, lower than the rate set for state institutions, the associations should be exempt altogether from taxation. The true measure, however, is not mathematical equality. *First Nat'l Bank of Wellington* v. *Chapman*, 173 U.S. 205, 216 (1899).[11] The associations, like other busi-

[10] Such a law presents a poor target for judicial intrusion. *Cf. Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963) ("courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws").

[11] It is a truism, as *Chapman* declared, that "mathematical equality . . . cannot be reached in any system of taxation, and it is useless and

nesses domiciled in Massachusetts, must pay their fair share for the maintenance of their state government.[12]

At bottom, the validity of § 11 turns on the meaning of § 5(h) of the Home Owners' Loan Act, § 1464(h). It reads as follows:

> No State . . . taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income *greater than* that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions. (Emphasis added.)

The Supreme Court has addressed the meaning of § 1464(h) twice. On both occasions the Court construed the "greater than" language to refer to "discrimination" in the state's treatment of federal and state institutions. *Michigan Nat'l Bank* v. *Michigan, supra,* 365 U.S. at 481; *Laurens Fed. Sav. & Loan Ass'n* v. *South Carolina Tax Comm'n,* 365 U.S. 517, 523 (1961). The Court has further stated that the meaning of discrimination in this context is to be derived from 12 U.S.C. § 548, the law governing state taxation of national banks, which in the Court's words

idle to attempt it. Equality, so far as the differing facts will permit, and as near as they will permit, is all that can be aimed at or reached." 173 U.S. at 216.

[12] The associations seek to recover all taxes collected by Massachusetts since 1966, the date the taxing statute was enacted. *See, e.g.,* Complaint, ¶¶ 83, 88, and Prayer 1(a) (S.J.C. App. 47, 48, 54). The associations have already received refunds of all moneys collected under the deposits-based portion of the tax (M.G.L. c. 63, § 11(a)(2), (b)(2)) pursuant to the mandate in *United States* v. *State Tax Comm'n,* 481 F. 2d 963 (1st Cir. 1973).

should be read "in pari materia" with § 1464(h).[13] *Michigan Nat'l Bank* v. *Michigan, supra,* 365 U.S. at 481.

Thus, appellants' speculations in favor of a constricted reading of the words "greater than" must face compari-

[13] The reasons for the "in pari materia" relationship are not hard to find. Section 1464(h) was enacted as one part of the Home Owners' Loan Act of 1933, c. 64, §§ 1-9, 48 Stat. 128, a detailed scheme which created the federal savings and loan associations. Like national banks, the associations are chartered, regulated and insured by the federal government. In creating the associations Congress was absorbed with the primary issue of channeling loans to homeowners. In neither the Congressional reports, *see* H.R. Rep. No. 55, 73d Cong., 1st Sess. (1933); H.R. Rep. No. 210, 73d Cong., 1st Sess. (1933), nor the floor debate, *see* 77 Cong. Rec. 2429, 2474-2507, 2567-2588, 4930, 4974, 4995, did Congress focus on the meaning of § 1464(h).

In the area of national banks, however, Congress has deliberated and legislated over a long period on the question of state taxing power. The result has been a policy designed to "prevent actual discrimination" against national banks while "allow[ing] the states considerable freedom in working out an equitable tax system . . .." *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n,* 309 U.S. 560, 567 (1940); *see, e.g., Davenport Bank* v. *Davenport Board of Equalization,* 123 U.S. 83, 85 (1887).

When the Home Owners' Loan Act of 1933 was enacted, § 548 read as set forth in the statutory appendix to this brief (Revised Statutes § 5219, *infra,* pp. 49-51). In 1969, Congress enacted the current version of § 548. Pub. L. 91-156, § 2(a), 83 Stat. 434. It states:

> For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Legislative history to this new § 548 stated: "The committee is in full accord with the principle that every State government should be allowed the greatest possible degree of autonomy with regard to the formulation of its tax structure." S. Rep. No. 91-530, 91st Cong., 1st Sess., *reprinted in* [1969] U.S. Code Cong. & Ad. News 1594, 1595.

son with the Court's decisions construing § 548.[14] Those decisions reflect a respect for federalism, limited by principles of fair dealing. Thus, the Court from an early date has held:

> The main purpose of Congress . . . in fixing limits to state taxation . . . was to render it impossible for the State, in levying such a tax, to create and fix *an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business* and operations and investments of a like character. The language of the act of Congress is to be read in light of this policy. *Mercantile Bank* v. *New York*, 121 U.S. 138, 155 (1887) (emphasis added).

[14] It is arguable that states possess inherently greater taxing power over federal savings and loan associations than over national banks. Congress enacted § 548 because the Supreme Court had held national banks to be federal instrumentalities, exempt from state taxation unless and only to the extent permitted by Congress. *Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664, 667-668 (1899). *See McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). However, this Court has never held a federal savings and loan association to be a federal instrumentality. If the question were presented to a *tabula rasa*, it is not self-evident that the Court would so classify them, since even the continuing validity of the designation of national banks, as "federal instrumentalities" is in doubt. *See First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 348-363 (1968) (Marshall, Harlan and Stewart, JJ., dissenting) *United States* v. *County of Fresno*, 429 U.S. 452, 457-463 (1977); Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication*, 75 Mich. L. Rev. 1426, 1446-1452 (1977). *See also* S. Rep. No. 91-530, *reprinted in* [1969] U.S. Code Cong. & Ad. News 1594, 1595. (Senate Committee on Banking and Currency agrees that "there is no longer any justification" for tax immunity based on the "federal instrumentality" label).

The fact that acts of Congress have addressed the area does not entirely moot the question. For if federal savings and loan associations are not federal instrumentalities, state taxation in some degree would be possible without the permission of Congress. In such circumstances § 1464(h) should be read more generously than § 548, since § 548 permits taxes on national banks which would be foreclosed altogether without Congressional action. *Cf. Railroad Co.* v. *Commissioners*, 103 U.S. 1, 3 (1880) (presumption is against immunity from state taxation); *United States* v. *City of Detroit*, 355 U.S. 466, 474 (1958) (use of tax immunity to achieve economic preference over competitors disfavored by Court).

See Bank of Redemption v. *City of Boston*, 125 U.S. 60, 67 (1888) (exact equality in result not required); *First Nat'l Bank of Wellington* v. *Chapman*, *supra*, 173 U.S. at 213-214 (quoting *Mercantile Bank* and upholding state law).

More recently, the Court has sounded the same theme:

> [A] State's tax system offends only if in *practical operation* it discriminates against national banks or their shareholders as a class. *Michigan Nat'l Bank* v. *Michigan*, *supra*, 365 U.S. at 476 (emphasis added).[15]

What § 548 and, by derivation, § 1464(h) prohibit are state laws which use the taxing power to create an unfair advantage for state institutions competing with national banks or federal associations through tax systems which have a substantially disproportionate impact on the federal institutions. *See, e.g., People* v. *Weaver*, 100 U.S. 539

[15] The only case other than *Michigan Nat'l Bank* to mention § 1464(h) was *Laurens Fed. Sav. & Loan Ass'n* v. *South Carolina Tax Comm'n*, *supra*. The Court there stated that the purpose of § 1464(h) was to bar "discriminatory state taxation." 365 U.S. at 523. At issue in *Laurens* was the propriety of a state tax on loan advances by the Federal Home Loan Bank Board, in light of the categorical tax exemption for the Board in 12 U.S.C. § 1433. The Court thus had no reason to, and did not, analyze the meaning of discrimination under § 1464(h).

(1879) (state withholds from national bank shareholders a deduction given to moneyed capital otherwise invested).

The state tax imposed by § 11 contains no such unfairness, either on its face or in its practical application. The rate of the tax is the same for all taxed institutions, state and federal. The same deductions apply to all institutions as well. And the guaranty fund deduction does not directly affront a Congressional policy, as was the case in *United States* v. *State Tax Comm'n*, 481 F. 2d 963 (1st Cir. 1973), where the deposits tax deduction directly penalized federal associations for having a 100-mile real estate mortgage lending radius.[16] See p. 4, *supra*.

These elements establish the neutrality of § 11. What remains is the question whether, in its operation, the statute produces a tax burden so disparate in impact that, neutrality notwithstanding, the tax must fall. The associations have not presented substantial evidence on this issue. First, they have failed to offer facts deemed vital by this Court in assessing claims of tax discrimination. Second, the evidence they do offer on the guaranty fund deductions shows no pattern of discriminatory impact. Finally, no inference can be drawn of an "unfriendly motive" by the Legislature in creating the deduction for required additions to the guaranty fund. *Cf. United States* v. *State Tax Comm'n*, *supra*, 481 F. 2d at 970.

(1) *Lack of Proof of Tax Impact.*

The associations' own argument is that impact is the key (Appellants' ["App."] Br. 21, 29), but nowhere on the

[16] The 50-mile limit for deductions from the deposits tax could only be explained as favoring the lending limits imposed on Massachusetts banks. If that deduction was to be justified, therefore, it had to be on the basis that such favoritism was permissible. Here, by contrast, there is plainly a neutral explanation for the deduction. See pp. 10-11, *supra*.

record do they present evidence of overall comparative tax burdens or the comparative tax impact of the challenged deduction by itself.[17] As a result, the record is bare on the question of the state statute's "practical operation," *Michigan Nat'l Bank* v. *Michigan*, *supra*, 365 U.S. at 476.

The Court has emphasized that it is:

> . . . incumbent upon plaintiff in error to show affirmatively that the [state] taxation system discriminates in fact against [him], before calling upon the courts to overthrow it . . .. *Amoskeag Savings Bank* v. *Purdy*, 231 U.S. 373, 393 (1913).[18]

The associations bear the burden of providing the Court with a record which "affirmatively" demonstrates that the

[17] The reason for the associations' failure to present such evidence is apparent. The public record reveals that since 1966 the associations have consistently paid less or the same taxes in proportion to total assets than either state savings or cooperative banks. *See* [1968] Mass. Comptroller's Rep., Mass. Pub. Doc. 140 (1969), *abstracted in* Mass. H.R. No. 800 (1969); [1970] Mass. Comptroller's Rep., Mass. Pub. Doc. 140 (1971), *abstracted in* Mass. H.R. No. 800 (1971); [1976] Mass. Comptroller's Rep., Mass. Pub. Doc. 140 (1977), *abstracted in* Mass. H.R. No. 800 (1977).

[18] The Court, in *Michigan Nat'l Bank*, *supra*, elaborated on *Amoskeag* as follows:

> "[I]t is not a valid objection to a tax on national bank shares that other moneyed capital in the state [is] . . . taxed at a different rate or assessed by a different method unless it appears that the difference in treatment results *in fact* in a discrimination unfavorable to the holders of the shares of national banks." 365 U.S. at 478-479, quoting *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n*, *supra*, 309 U.S. at 567 (emphasis added).

tax in question "discriminates in fact." *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n*, *supra*, 309 U.S. at 567-568 (Court provided with stipulated facts regarding actual tax burdens); *see, e.g., First Nat'l Bank of Hartford* v. *City of Hartford*, 273 U.S. 548, 559 (1927) (ample uncontradicted evidence demonstrated discrimination). This burden is particularly important when a tax statute is neutral on its face. *First Nat'l Bank of Wellington* v. *Chapman*, *supra*, 173 U.S. at 218-219.

(2) *Ambiguity of Evidence Presented.*

The evidence which appellants did choose to bring forward contradicts their claim of discrimination. Principally, they present for each federal and state institution covered by § 11 a record of deductions for required additions to guaranty funds over a number of years (A. 15-129). Rather than tying these figures to tax payments, the associations proffer only ratios of guaranty fund deductions to assets for the three types of affected institutions. These ratios prove nothing, however, about the tax impact of the deductions, since income, not assets, is the measure of the tax. The ratios are therefore immaterial to the Court's inquiry.

Moreover, these ratios show that in the most recent year, 1974, the associations received in the aggregate a larger deduction for additions to the guaranty fund than either the savings banks or cooperative banks (A. 130-132). Overall, the ratios are in such close compass for all institutions as to belie any injury on account of the deduction under § 11, much less discrimination[14] (A. 130-132).

[14] Additions to guaranty funds for the three types of institutions are not calculated on the same base. See pp. 5-6, nn. 7, 8, *supra*. Accordingly, the ratios do not provide an accurate basis of comparison between the associations and savings and cooperative banks.

Unless precise mathematical equality is the standard under § 1464(h), appellants cannot prevail. This Court has never permitted such a "mathematical nicety"[15] to become the measure of discrimination in the banking[16] or indeed in any other sphere of discrimination analysis.[17] It should not do so in this case.[18]

[15] *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

[16] *E.g.*, in *First Nat'l Bank* v. *Anderson*, 269 U.S. 341, 348 (1926), the Court stated:

> The [§ 548] restriction is not intended to exact mathematical equality . . . nor to do more than require such practical equality as is reasonably attainable in view of the differing situations . . ..

[17] *E.g.*, *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (equal protection); *cf. Washington* v. *Davis*, 426 U.S. 229, 239-240 (1976) (same); *South Carolina State Highway Dept.* v. *Barnwell Brothers, Inc.*, 303 U.S. 177, 190-191 (1938) (Commerce Clause).

[18] Although the record does not disclose the tax impact of the challenged deductions, it does suggest that the impact is, at most, very small. Using 1974 for comparison, it appears that the 144 state cooperative banks compiled a total deduction of $13,069,201 for minimum required additions to their guaranty funds, or an average deduction of $90,758 (A. 52-56, 131). The 167 savings banks shared a total deduction of $37,850,736.73, averaging $226,651 per bank (A. 105-111, 131). By comparison, the 34 federal savings and loan associations shared a deduction of $7,508,841, or an average $220,848 per association (A. 132). These are not figures which lend support to a claim of discrimination.

A review of the list of deductions for individual institutions further negates a discriminatory pattern. For example, during the period 1968-1974 some federal savings and loan associations had no deductions for additions to the guaranty fund, *e.g.*, Bay State Federal Savings & Loan Association (A. 113), while others had substantial deductions each year, *e.g.*, First Federal Savings & Loan Association of Lowell, Leader Federal Savings & Loan Association (A. 118). Some had no deductions in early years, *e.g.*, Mutual Federal Savings & Loan Association of

(3) *Unfriendly Motive.*

In 1966, at the time § 11 was enacted, the federal savings and loan associations were required under the terms of their charter to maintain reserves equal to 10 per cent of their capital.[14] This requirement was equal to the state requirement for cooperative banks and greater than the guaranty fund requirement for savings banks.[15] It was not until 1970, as noted in the Solicitor General's brief,[16] that the associations' reserve requirements were lowered to their current level. 12 C.F.R. § 544.1, 35 Fed. Reg. 4044 (March 4, 1970; effective April 10, 1970).[17] Thus, contrary to the appellants' assertions, it is plain that the Massachusetts Legislature had no intent to discriminate against the federal associations in enacting the guaranty fund deduction. *Cf. United States* v. *State Tax Comm'n, supra,* 481 F. 2d at 970.

Whitman (A. 123), while others lacked deductions only in recent years, *e.g.*, Milford Federal Savings & Loan Association (A. 122). Fluctuations also appear in the guaranty fund deductions for savings and cooperative banks, *e.g.*, 21 savings banks had no deductions in 1968 (A. 63-67). Grafton Cooperative Bank and New Bedford Acushnet Cooperative Bank had no deductions during 1972-1975 (A. 41-61).

[14] *See* Stipulation of Facts, ¶ 2 (A. 11), Charter N, ¶ 10 (S.J.C. App. 145), and Charter K (rev.), ¶ 10 (S.J.C. App. 148).

[15] *See* p. 6, n. 8, *supra*. Notably, the savings banks' assets are far larger than either the federal associations' or cooperative banks' (A. 130-132). Acceptance of the appellants' argument would compel the conclusion that the Legislature discriminated against the dominant state institution.

[16] Brief for the United States, p. 18, nn. 5, 6.

[17] See p. 5, n. 7, *supra*, and S.J.C. App. 149-150. The lower reserve requirements were optional, requiring a charter amendment to take advantage of them. The record discloses that four of the appellants have not amended their charters (S.J.C. App. 152, n. 1), and, accordingly fail to state a claim for relief.

Finally, the appellants' characterization of their smaller current guaranty fund additions as a burden is a self-serving assertion contrary to reason. The smaller requirements permit them to use more of their money for lending purposes or for distribution to members.[18] It is the institutions with higher guaranty fund requirements which bear a comparative burden, by having to take more money out of circulation. The Massachusetts Legislature's decision to permit the guaranty fund deduction is plainly a reflection of this fact. It is not surprising, therefore, that the associations have offered no credible inference of an unfriendly legislative motive underlying the guaranty fund deduction.[19] *See Michigan Nat'l Bank* v. *Michigan, supra,* 365 U.S. at 473; *cf. United States* v. *State Tax Comm'n, supra,* 481 F. 2d at 970.

The tax on appellants is rational and fair. The statute should be upheld.

---

[18] The associations criticize the state court's suggestion that the money not required for guaranty fund additions could be distributed to members (App. Br. 22). *See* J.S. 40, Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482. They point to the limits on distribution of profits, apparently chiding the court for not realizing that the associations are enjoying profits in excess of distribution capacity. Such funds may, of course, be held for distribution in less affluent years.

[19] As the Supreme Judicial Court pointed out, "[t]he cause of the discrimination is the lower requirements imposed by the Federal regulatory agency on Federal savings and loan associations. The Commonwealth is not the source of the discrimination." J.S. 40, Mass. Adv. Sh. (1977) at 909, 363 N.E. 2d at 482.

II. The Exemption of Massachusetts Credit Unions from the Challenged Tax is Consistent with the Provisions of 12 U.S.C. § 1464(h), and does Not Serve to Invalidate the Tax.

A. *Introduction.*

The associations' second line of attack under § 1464(h) focuses on Massachusetts credit unions. Both state and federally chartered credit unions are exempt from the § 11 excise. The associations complain that the exemption as to the state credit unions[30] violates § 1464(h) because these entities constitute "other similar local mutual or cooperative thrift and home financing institutions" within the meaning of that section.

The claim demands rejection. Massachusetts credit unions are in character, purpose and operation different from the state-chartered banks and federal savings and loan associations subject to the § 11 tax. Since the creation of the state's first credit union in 1892,[31] credit unions have always been cooperative membership organizations composed of persons with moderate means who have pooled their individual, limited savings or deposits together; the purpose of the unions is to enable the members to obtain

[30] The associations limit their claim to state-chartered credit unions. Congress has exempted federally-chartered unions from all federal and state taxes except nondiscriminatory real and tangible personal property, social security, Medicare and unemployment insurance taxes. 12 U.S.C. § 1768 (1970); I.R.C. §§ 501(c)(14)(A), 3112, 3305.

[31] The Globe Savings and Loan Association, a credit union with a membership limited to employees of the *Boston Globe*, was established in that year. *See* J.L. Snider, *Credit Unions in Massachusetts* at 6 (1939). Massachusetts was the first state to enact a credit union statute, Mass. Stat. 1909, c. 419, which authorized the formation and incorporation of credit unions upon approval of the Commissioner of Banks.

personal loans at reasonable interest rates.[32] Unlike the institutions taxed by § 11, a credit union is an organization limited in membership to persons tied together by a common bond of employment, association or residence; and the members themselves control the operation of each union. Predictably, given these characteristics, there are a far greater number of credit unions than savings banks, cooperative banks or savings and loan associations in Massachusetts.[33] Predictably as well, the assets of credit unions are far smaller than those of the other financial institutions.[34]

Massachusetts' policy decision to exempt its credit unions from the franchise tax[35] represents a reasonable and valid taxing judgment which Congress and a large majority of states have also made. The legislative history of § 1464(h) provides a further specific indication that Congress did not intend to bring credit unions within the purview of the "other similar . . . institutions" language of § 1464(h). In light of these factors, the Court should not construe that

[32] *See* J.L. Snider, *supra*, at 3, 20. Put in statutory terms, credit unions are corporations organized "for the purpose of accumulating and investing the savings of its members and making loans to them for provident purposes . . .." M.G.L. c. 171, § 2 (West 1971).

[33] In 1973, there were 370 credit unions (A. 145; Annual Report of the Massachusetts Commissioner of Banks for 1973, Section B, at 84), 167 savings banks (A. 98-104), 144 cooperative banks (A. 46-51), and 34 federal savings and loan associations (A. 113-129).

[34] In 1973, Massachusetts credit unions' assets totalled $1,011,568,892 (Annual Report of the Massachusetts Commissioner of Banks for 1973, Section B, at 84); the total for savings banks was $18,456,156,660 (A. 131); the total for cooperative banks was $2,971,845,658 (A. 131); and the total for federal savings and loan associations was $2,477,195,150 (A. 132).

[35] Massachusetts credit unions are subject to real property taxes, sales and use taxes, and transfer taxes. See p. 25, n. 37, *infra*.

statutory language to include credit unions, and should affirm the validity of the Massachusetts tax statute.

B. *Congressional Taxing Policy Governing Credit Unions and the Legislative History of* § 1464(h) *Both Indicate that Credit Unions are Not "Similar" Institutions within the Scope of* § 1464(h).

When § 1464(h) is considered in the context of other pertinent tax statutes and policies of Congress and its legislative history, *see, e.g., Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *see also Muniz* v. *Hoffman*, 422 U.S. 454, 458, 468 (1975), it becomes clear that the section should not be read to include credit unions.

1. Congressional Taxing Policy.

Congress exempts both state and federal credit unions from federal income tax. I.R.C. § 501(c)(14)(A). It has not granted the same income tax exemption to federal savings and loan associations, savings banks, or cooperative banks. Rather, since 1951 Congress has imposed a corporate income tax on these institutions. *See* I.R.C. § 11 and subchapter H.[36]

[36] When Congress first created federal savings and loan associations in 1933, it exempted them from all federal taxes, including taxes on their franchises, capital, reserves, surplus, loans, and income. Home Owners' Loan Act of 1933, c. 64, § 5(h), 48 Stat. 133. In 1951 § 1464(h) was amended to permit, *inter alia*, federal taxes on the associations' income. Act of October 20, 1951, c. 521, Title III, § 313(d), 65 Stat. 490. In 1962, Congress amended § 1464(h) to its present form, striking out all the previously stated prohibitions on federal taxes. Act of October 16, 1962, Pub. L. 87-834, § 6(e)(1), 76 Stat. 984.

These statutes demonstrate that Congress itself has made a tax policy determination in substance identical to that espoused by the Massachusetts Legislature in § 11: savings and loan associations, savings banks and cooperative banks should be taxed on income; credit unions should not.[37] In these circumstances, § 1464(h) should not be read as meaning that a state which taxes federal savings and loan associations — an activity explicitly permitted by § 1464(h) — must apply the same tax to state-chartered credit unions. Such an interpretation would require states either (a) to impose a tax on a class of organizations which Congress has consistently deemed worthy of tax protection, or (b) to forgo collecting a tax on a class of institutions which Congress has determined may properly be taxed. A reading of § 1464(h) which requires this result must be avoided. *See, e.g., Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966); *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940). *Cf. Laurens Fed. Sav. & Loan Ass'n* v. *South Carolina Tax Comm'n*, 365 U.S. 517, 524 (1961).

[37] Congress' and Massachusetts' credit union tax policy is mirrored by other states; all but a small number, fewer than ten, exempt state-chartered credit unions from income or franchise taxes. *See* [1976] Credit Union Guide (Prentice-Hall) ¶ 60,003 at p. 60,005. At the same time, most states, including Massachusetts, impose property taxes and sales and use taxes on credit unions. *See* M.G.L. c. 59 (West 1973 and Supp. 1977) (real property tax); c. 64H, § 2 (West Supp. 1977) (sales tax); c. 64I, § 2 (West Supp. 1977) (use tax); *see also* [1976] Credit Union Guide (Prentice-Hall) ¶ 60,003 at pp. 60,006, 60,007. In addition, Massachusetts, like the majority of states, imposes a stamp or transfer tax on credit unions. *See* M.G.L. c. 64D, § 1 (West 1969); *see also* [1976] Credit Union Guide (Prentice-Hall) ¶ 60,003 at p. 60,005.

2. The Legislative History of § 1464(h).

Legislative history surrounding the enactment of the Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U.S.C. §§ 1461-1468, offers further guidance to the meaning of "similar . . . institutions" in § 1464(h). The history reveals that Congress did not consider credit unions as "similar," thus supporting their exclusion from the § 11 tax.[38]

The Home Owners' Loan Act was designed to provide individuals with access to credit at low cost to finance or refinance their homes. *See* § 5(a) of the Act, 12 U.S.C. § 1464(a); 77 Cong. Rec. 2476-2477, 2479; *Laurens Fed. Sav. & Loan Ass'n* v. *South Carolina Tax Comm'n*, 365 U.S. 517, 523 (1961). The savings and loan associations which the Act provided for were created to offer direct, local sources of home financing credit, particularly in communities with inadequate institutional lending facilities.

Several sections of the Home Owners' Loan Act contained language very similar to the phrase "other similar local mutual or cooperative thrift and home financing institutions" appearing in § 1464(h).[39] Congressional debate

[38] Although the legislative history did not focus on § 1464(h) specifically, see p. 13, n. 13, *supra*, it did address the question of similar local institutions in its discussion of other sections. When available, such insights into the intent of Congress must be explored. *See Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 157 (1972); *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479 (1963); *see National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 619-20 (1967); *Laurens Fed. Sav. & Loan Ass'n* v. *South Carolina Tax Comm'n*, *supra*, 365 U.S. at 521, 523-524. *See* H.R. Rep. No. 55, 73d Cong., 1st Sess. (1933), p. 2; S. Rep. No. 91, 73d Cong., 1st Sess. (1933), p. 2.

[39] *See* § 5(a) of the Act, 12 U.S.C. § 1464(a) (Federal Home Loan Bank Board to provide for creation of federal savings and loan associations, giving "primary consideration to the best practices of *local mutual thrift and home-financing institutions* in the United States" [emphasis supplied]); § 5(e) of the Act, 12 U.S.C. § 1464(e) ("[n]o charter [for a federal savings and loan association] shall be granted . . . unless the same can be established without undue injury to properly conducted existing *local thrift and home financing institutions*" [emphasis supplied]); § 6 of the Act, 12 U.S.C. § 1465 (appropriating sums for "the promotion and development of *local thrift and home-financing institutions*, whether State or Federally chartered").

concerning these sections — §§ 1464(e) and 1465 in particular — provides a clear indication of the specific types of local institutions with which Congress was concerned. Credit unions were not included.[40] *See* 77 Cong. Rec. 2480, 2579 (remarks of Representatives Luce and Celler);[41]

[40] The legislative history of §§ 1464(e), 1465 and other sections of the Home Owners' Loan Act is clearly pertinent to a consideration of § 1464(h). As a general rule, words used in one part of a statute are to be given a consistent meaning when they appear in other parts of the same statute. *See e.g.*, *United States* v. *Cooper Corp.*, 312 U.S. 600, 606-607 (1941); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); *see also Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972). There is no indication that Congress intended "other local mutual or cooperative thrift and home financing institutions" in § 1464(h) to have any different meaning than the similar language it used in §§ 1464(a), 1464(e) and 1465. *See Union Nat'l Bank of Clarksburg* v. *Home Loan Bank Board*, 233 F. 2d 695, 696 (D.C. Cir. 1956). In particular, the use of the terms "mutual" and "cooperative" in § 1464(h) but not in the other sections seems without significance; Congressional discussion of the other provisions shows that the entities considered as "local thrift and home financing institutions" were in fact "mutual" or "cooperative" organizations.

[41] The Congressmen here were debating the provisions of §§ 1465 and 1464(e). Representative Luce of Massachusetts, a sponsor of the Act, indicated at 2480 that the purpose of encouraging the development of federal savings and loan associations — the specific aim of § 1465 — was to serve the many communities in the country that had no "building and loan associations, mutual savings banks, and no insurance company . . .." He defined "thrift institutions" in similar terms. (He also explained that building and loan associations were essentially identical to cooperative banks, *id.*) As a sponsor, Representative Luce's views on the Act's meaning are entitled to great weight. *See National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, 386 U.S. at 640.

4987 (remarks of Representative Hebert);[42] *see also* 77 Cong. Rec. 2479 (remarks of Representative Luce); 2481 (remarks of Representatives Celler and Luce); 2483-2486 (Federal Home Loan Bank Board study of financing institutions' mortgage activities; credit unions not included).

The failure to mention credit unions in connection with these sections of the Home Owners' Loan Act cannot be explained away as happenstance. The Congress which passed that Act was well aware of credit unions. In its next sitting it enacted legislation to establish a federal credit union system. Federal Credit Union Act of 1934, 48 Stat. 1216, 12 U.S.C. §§ 1751-1790. This legislation was introduced by the respective branches' Committees on Banking and Currency, which had also been responsible for the Home Owners' Loan Act. *See* 77 Cong. Rec. 3206 (Senate, 1933); 7259-7261 (Senate, 1934); 12218-12226 (House, 1934). Indeed, in the House of Representatives the same individuals who had managed the Home Owners' Loan Act were also the sponsors of the Federal Credit Union Act. *See* 77 Cong. Rec. 12218, 12223, 12224-12225. In Congressional debate about the Credit Union Act, no link was drawn or suggested between credit unions and savings and loan associations, although the Act itself permitted credit unions to take mortgages.[43] 77 Cong. Rec. 3206, 7259, 12223-12225. Moreover, the Federal Credit Union Act established a regulatory system which lodged supervisory

[42] Representative Hebert debated the language in § 1464(e) providing that no charter for a new federal savings and loan association should be granted if it would unduly injure "properly conducted existing local thrift and home-financing institutions." His discussion makes clear that he understood "local thrift and home-financing institutions" to refer to building and loan associations and related home financing organizations; this interpretation appears accepted by all.

[43] *See* § 7 of the Act, now 12 U.S.C. § 1757.

control in the Farm Credit Administration rather than in the Federal Home Loan Bank Board. The credit unions thus operated independently of the federal savings and loan associations and the entire Federal Home Loan Bank system of which the associations were and are a part. *Compare* 12 U.S.C. §§ 1421, 1423, 1424, 1464(f), *with* Federal Credit Union Act of 1934, §§ 2, 16, 12 U.S.C. §§ 1752a, 1753-1756, 1766.

The legislative record thus shows a Congressional understanding of credit unions as a class of organizations separate from the lending institutions mentioned in connection with § 1464(h). Neither the Federal Credit Union Act nor § 1464(h) has been amended in a way that would suggest a change in this view. In such circumstances, § 1464(h) should be construed to reflect the limitations intended by its framers. *See, e.g., Monroe* v. *Pape*, 365 U.S. 167, 191 (1961); *see also Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 626 (1974); *cf. United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799-800 (1969). The reasons advanced by appellants and the United States in this case for extending § 1464(h) are essentially policy arguments, appropriately addressed to Congress and not this Court. *See First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 345-46 (1968).[44]

[44] *First Agricultural Nat'l Bank*, also involving a Massachusetts tax on federally-chartered financial institutions, pointed out the special importance of judicial deference in this field because it is an area of particular Congressional concern. Recent legislative action relating to credit unions and savings and loan associations underscores the wisdom of this observation. The lending, borrowing and investment powers and tax treatment of these entities, among others, has recently been the subject of a comprehensive study. *See* Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., *Report of the President's Commission on Financial Structure and Regulation (December, 1972) Including Recommendations of the Department of the Treasury* (Comm. Print 1973). As this Report shows, the President's Commission recom-

C. *The Purposes, Powers and Operation of Massachusetts Credit Unions as Reflected in This Record Demonstrate the Absence of Similarity Between Credit Unions and the Associations.*

Both the associations and the Solicitor General[45] avoid any reference to the legislative history of § 1464(h) or to other relevant taxing statutes that bear on the proper construction of § 1464(h). They would have the Court view the issue of "similarity" in a vacuum, divorced from its historical underpinnings and proper context. This is a path the Court has firmly rejected. *See, e.g., Muniz* v. *Hoffman, supra,* 422 U.S. at 467; *Moody* v. *Albemarle Paper Co., supra,* 417 U.S. at 626. However, even if viewed on its own terms, the associations' argument lacks substance.

1. Statutory Purposes and Powers.

Appellants contend that the powers and purposes of Massachusetts credit unions coincide with those of federal

mended equal tax treatment of credit unions and other deposit intermediaries, including savings and loan associations, *id.* at 57-58, 71; the Treasury Department, working from the President's Commission's recommendations, supported continuing tax exemptions for credit unions. *Id.* at 185; *see id.* at 186. Congress, however, has retained the income tax exemption for state-chartered credit unions, and the broader tax exemption for federally-chartered unions. Congressional inaction does not justify judicial revision. The policy-making branches should continue the debate in their own spheres.

[45] In judging that the exemption of Massachusetts credit unions from § 11 violates § 1464(h) (U.S. Br. at 14-16), the United States has contented itself with summarizing the associations' brief. Its discussion of the credit union claim does not rely on, or cite, a single decision of this or any other court.

savings and loan associations. A brief review of the two types of institutions contradicts their argument.

Massachusetts credit unions are cooperative organizations, chartered by the state, M.G.L. c. 171, § 2, and created to serve the personal credit needs of people with limited incomes.[46] They operate "for the purpose of accumulating and investing the savings of [their] members and making loans to them for provident purposes." *Id.* While they may make mortgage loans, by specific statutory command the major focus of their lending activities is on personal loans. *See* M.G.L. c. 171, § 24(a)-(g) (West Supp. 1977).[47]

Credit union members are united by a common bond of occupation, association or residence. *See* M.G.L. c. 171, § 7 (West 1971).[48] Every member must hold at least one share in the credit union, and every member, regardless of

[46] *See* J.L. Snider, *Credit Unions in Massachusetts* at 3-5, 6, 20-21 (1939).

[47] These provisions list the seven types of loans credit unions may make; personal loans (§ 24[a]) and "[l]oans secured by first mortgages of real estate" (§ 24[b]) are two of the seven. The section then provides:

> Personal loans shall always be given the preference and, in the event there are not sufficient funds available to satisfy all loan applications approved by the credit committee, preference shall be given to the smaller loan.

[48] Appellants claim there are no statutory limitations on credit union membership. They overlook M.G.L. c. 171, § 7(c), which requires that every credit union's bylaws define "[t]he condition of residence, occupation or association which qualify [*sic*] persons for membership." The bylaws must be approved by the state Commissioner of Banks before the credit union may operate, and the Commissioner must specifically approve any amendment to bylaws governing membership qualifications. M.G.L. c. 171, §§ 9, 8 (West Supp. 1977). The Massachusetts statutory provisions on credit union membership are virtually the same as many other states' credit union statutes. *See, e.g.,* Conn. Stat. Ann. Tit. 36-196 (West Supp. 1978); N.H. Rev. Stat. Ann. § 394:5 (1968 Replacement Ed.); R.I. Gen. Laws § 19-21-5(M) (Bobbs-Merrill 1976).

how many shares, has one vote. This principle of democracy in voting is combined with a high degree of membership control over the operations of a credit union: members set the ceiling on loans and, through their elected directors, establish interest rates on loans and deposits and declare dividends. *See* M.G.L. c. 171, §§ 13, 15, 16, 18, 21, 25 (West 1971 and Supp. 1977).

Federal savings and loan associations are structured to operate differently. From the beginning, their mandate has been to serve as organizations designed "to provide for the financing of homes." 12 U.S.C. § 1464(a). The detailed statutory provisions governing the types and amounts of loans which associations may make, 12 U.S.C. § 1464(c) (Supp. V 1975, *as amended by* Act of August 3, 1976, Pub. L. 94-375, § 22, 90 Stat. 1078), show that this statutory purpose remains in full force today: virtually all permissible loans are related to real estate, and the associations' powers to lend money for personal loans, or non-real estate loans of any kind, is extremely limited. *See* 12 U.S.C. § 1464(c)(A), (B).[49]

The core of appellants' complaint about credit unions is their ability to make loans secured by first mortgages on real property. Credit unions have had this power for many years. *See* Mass. Stat. 1926, c. 273, § 24; J.L. Snider, *Credit Unions in Massachusetts* at 13-16 (1939). While the

[49] In terms of organization as well, the federal savings and loan associations are markedly distinct from state credit unions. The associations' operations are regulated in all important particulars by the Federal Home Loan Bank Board. *See* 12 U.S.C. §§ 1464(a), (b), (d), (e), (f), (i) (1970 and Supp. V 1975); 12 C.F.R. §§ 500.3, 541.1-556.9 (1977). In addition, a federal savings and loan association, when designated as a depository fiscal agent of the United States, 12 U.S.C. § 1464(k) (1970), is subject to direct regulation by the Secretary of the Treasury. *See* 12 C.F.R. § 545 (1977). The central role played by the members in the affairs of credit unions thus finds no parallel among the associations.

restrictions on credit unions' abilities to make mortgage loans have been relaxed over time,[50] the terms and conditions governing such loans overall remain very different from those applicable to federal savings and loan associations.[51] *Compare* G.L. c. 171, § 24(B), *with* 12 U.S.C. § 1464(c). The state court recognized this fact. *See* J.S. 43-44 and n. 9, Mass. Adv. Sh. (1977) at 913-914 and n. 9, 363 N.E. 2d at 484 and n. 9.

The relationship between state-chartered credit unions and federal savings and loan associations is not an issue of first impression. Three state courts in addition to the Supreme Judicial Court and one federal court have examined the question and all have found that credit unions fall outside § 1464(h). *First Fed. Sav. & Loan Ass'n* v. *Connelly*, 142 Conn. 483, 492, 115 A. 2d 455, 459 (1955),

[50] In citing maximum permissible amounts a credit union may accept on deposit or may lend on the security of a first mortgage, appellants refer in their brief only to those figures applicable to the largest credit unions, primarily those with assets over $4 million (App. Br. at 36-38). This selective method of citation is misleading, because the record does not indicate how many state-chartered credit unions in Massachusetts fall into the larger categories. In fact, only a small percentage of the 370 credit unions have assets over $4 million. *See* Annual Report of the Massachusetts Commissioner of Banks for 1973, Section B, at 45-79. The maximum deposits and loans which smaller credit unions are permitted to accept and make are more limited. *See* M.G.L. c. 171, §§ 10, 24(A), 24(B) (West Supp. 1977, *as amended by* Mass. Stat. 1977, c. 15, 19, 20-24).

[51] A situation may arise where an individual credit union neglects its statutory duty to favor personal over real estate loans. If so, the proper remedy is in state court to correct this situation. Individual credit unions' failures to perform their statutory obligations should not become the basis for striking down a duly enacted taxing statute on its face.

Furthermore, credit unions may only loan to members. The inherent limitations on every credit union's membership, resulting from the common bond requirement, in effect precludes them from directly competing with the associations for the home mortgage market.

appeal dismissed for want of a substantial federal question, 350 U.S. 927 (1956); *State* v. *Minnesota Fed. Sav. & Loan Ass'n*, 218 Minn. 229, 239-241, 15 N.W. 2d 568, 573-574 (1944); *Manchester Fed. Sav. & Loan Ass'n* v. *State Tax Comm'n*, 105 N.H. 17, 19-21, 191 A. 2d 529, 531-532 (1963); *see also United States* v. *State Tax Comm'n*, 348 F. Supp. 397, 400 (D. Mass. 1972), *aff'd and modified*, 481 F. 2d 963 (1st Cir. 1973); *cf. La Caisse Populaire Ste. Marie* v. *United States*, 563 F. 2d 505, 507-509 (1st Cir. 1977). These decisions reflect reasoned judgments about the basic nature of credit unions, and should be followed here.[52]

2. Actual Operation of Credit Unions.

The Supreme Judicial Court concluded that the test of "similarity" for purposes of § 1464(h) was what credit unions and federal savings and loan associations do "in fact," rather than what they might do. J.S. 43, Mass. Adv. Sh. (1977) at 913, 363 N.E. 2d at 484. Under this standard the associations claim to have demonstrated actual competition between themselves and the Massachusetts credit

[52] There is a final consideration. Decisions of this Court concerning 12 U.S.C. § 548, the national bank tax provision, recognize that the states have wide latitude in deciding how to treat a class of its own state-chartered financial institutions for tax purposes. *See, e.g., Michigan Nat'l Bank* v. *Michigan*, 365 U.S. 467, 482 (1961); *Bank of Redemption* v. *City of Boston*, 125 U.S. 60, 67-68 (1888); *Mercantile Bank* v. *New York*, 121 U.S. 138, 160-161 (1887). All conclude that the states could reasonably exempt savings banks from taxes they imposed on the national banks. The same principle applies to Massachusetts' exemption of credit unions from the tax under attack. Its determination is a reasonable exercise of legislative judgment which should not be interfered with by this Court, particularly since it is one which is shared by Congress and most other states. See pp. 24-25, nn. 36, 37, *supra*.

unions (App. Br. at 39-41). The assertion is without support.

In making their claim of competition, appellants rely heavily on statistics and data drawn from the Annual Report of the Massachusetts Commissioner of Banks for 1973, Section B ("Annual Report"), filed with the Legislature (App. Br. 40-41). Most of this information was never introduced as part of the record before the Supreme Judicial Court,[53] and therefore cannot be considered by this Court in this case.[54] *New Haven Inclusion Cases*, 399 U.S. 392, 450 n. 66 (1970); *Ciucci* v. *Illinois*, 356 U.S. 571, 573 (1958); *Hedgebeth* v. *North Carolina*, 334 U.S. 806 (1948); Sup. Ct. R. 36.

On the record that was before the state court, the associations failed to support their claim of discrimination, for they did not make any showing of the extent, if any, to which the two classes of institutions were in direct or actual competition with each other.[55] As the state court ruled,

[53] The associations submitted certain statistics from the Annual Report to the Supreme Judicial Court after oral argument; the appellees filed a timely objection (A. 145). That court did not rule on the inclusion of this evidence in the record, but its rules prohibit the inclusion absent affirmative permission. Mass. R. App. P. 18, 365 Mass. 844, 864 (1974). Since that permission was not forthcoming, the material should not be considered as part of the record before this Court.

In addition, the associations' brief contains references to other portions of the Annual Report that were not submitted at any time to the Supreme Judicial Court.

[54] Should the Court decide to review the information submitted by the associations, however, it is appropriate that the Court have before it the entire Annual Report. To that end, defendants have filed a separate Motion To Accept Material to Supplement Record, which pertains to this Report.

[55] The only evidence in the record is a comparison of the percentages of assets which credit unions and federal savings and loan associations hold in various categories (A. 135-144). As the Supreme Judicial Court

such a showing was essential. J.S. 44, Mass. Adv. Sh. (1977) at 914, 363 N.E. 2d at 484. *See Michigan Nat'l Bank* v. *Michigan, supra,* 365 U.S. at 477, 482; *First Nat'l Bank* v. *Louisiana Tax Comm'n,* 289 U.S. 60, 64-65 (1933).

The associations fare no better if the selected statistical evidence on which they now depend is considered. They rely in large part on the real estate lending practices of 20 of the 370 credit unions (App. Br. 40). It is settled that proof of discrimination must show the evil to exist on a class basis; it is not enough merely to show that, in a limited number of individual instances, competition might be present. *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n,* 309 U.S. 560, 568 (1940); *see also Michigan Nat'l Bank* v. *Michigan, supra,* 365 U.S. at 476. A factual comparison by class negates appellants' selective marshalling of data and defeats their claim.[56]

In sum, appellants have not shown as a matter either of law or of fact that credit unions are "similar" institutions within the meaning of § 1464(h). They cannot escape the Massachusetts franchise tax on this ground.

---

pointed out, examination of these figures simply serves to highlight the difference in real estate activities of credit unions on the one hand and savings and loan associations, cooperative banks, and savings banks on the other. J.S. 44, Mass. Adv. Sh. (1977) at 913-914, 363 N.E. 2d at 484.

[56] In 1973, the year on which the associations have focused, there were 370 credit unions in Massachusetts. Annual Report at 84. Their average assets were 3.45 per cent of those held by federal savings and loan associations. *Compare id.* at 84 *with* A. 132. Of the 370 credit unions, 220, or 60 per cent, placed *no* real estate loans during 1973. Annual Report at 46-79. The credit unions' aggregate investments in real estate loans were approximately 15 per cent of the savings and loan associations' aggregate investments. *Compare* Annual Report at 84 *with* A. 132, 143.

III. The Type of Tax Chosen by the Massachusetts Legislature — A Franchise Tax Measured by Income — is Authorized by 12 U.S.C. § 1464(h).

The Supreme Judicial Court found that the tax imposed by § 11 is a franchise tax measured by income, a levy on the privilege of doing business in the Commonwealth. J.S. 36, Mass. Adv. Sh. (1977) at 904-905, 363 N.E. 2d at 480. The terms of § 1464(h) explicitly authorize states to impose a "tax on such associations or their *franchise* . . ." (emphasis added). Although the meaning intended by Congress in using the word "franchise" may be subject to independent inquiry by this Court,[57] appellants have offered nothing in legislative history or any other source to contradict the judgment of the court below that the § 11 tax falls into a category permitted by the explicit terms of § 1464(h).[58] Therefore, the state court's determination that the tax is authorized by Congress should stand.[59]

---

[57] *Compare Macallen Co.* v. *Massachusetts,* 279 U.S. 620, 626 (1929) (independent inquiry required), *with, e.g., Norton Co.* v. *Department of Revenue,* 340 U.S. 534, 538 (1951) (state construction conclusive as long as constitutional). *Cf. Gurley* v. *Rhoden,* 421 U.S. 200, 208 (1975).

[58] Appellants contend that the tax cannot be considered a "franchise" tax imposed on the privilege of doing business in Massachusetts, because it contains no apportionment provision (App. Br. 50-52). This is not so. The Court has recognized that state corporate franchise taxes may be measured by a variety of objects, including property exempt from direct taxation. *See Educational Films Corp.* v. *Ward,* 282 U.S. 379, 389-391 (1931); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n,* 266 U.S. 271, 280-285 (1924). The real issue is not whether the tax may properly be called a "franchise" tax, but whether the absence of an apportionment provision violates the Commerce Clause or Due Process and Equal Protection Clauses of the Fourteenth Amendment. These questions are discussed below. See pp. 40-47, *infra.*

[59] The court below accepted the appellants' general proposition that the state tax should fit within one of the categories listed in § 1464(h) to

The associations' other objections offered on appeal fail to raise any points which were not answered satisfactorily by the state court. They contend that the measure of the tax in § 11 is defective because it imposes only an income-related tax on appellants, while state institutions pay both an income- and deposits-related tax[60] (App. Br. 48, 60-61). As the Supreme Judicial Court correctly observed, "[t]his is not a circumstance of which the associations properly may complain," because the statute obviously does not forbid "discrimination . . . in favor of Federal savings and loan associations." J.S. 37-38, n. 8, Mass. Adv. Sh. (1977) at 906, n. 8, 363 N.E. 2d at 481, n. 8.[61]

Appellants also argue that if the § 11 tax is considered as a tax on "income" within the meaning of § 1464(h), it is not sanctioned by that section because the income taxed is not truly "net income." Their complaint is that Massachusetts does not recognize distributions to association members as a

be valid. However, the concern of the statute is nondiscrimination. The type of tax a state chooses bears no relation to that issue. Congress may therefore have intended its list as illustrative rather than exhaustive, to make the point that whatever the method of taxation, equality in treatment should be observed. Such a reading would be in harmony with Congress' current treatment of national banks. *See* 12 U.S.C. § 548, quoted at p. 13, n. 13, *supra*. Under such a reading, appellants' argument about the proper definition of the state tax would be academic.

[60] The difference in measures is the result of *United States* v. *State Tax Comm'n*, 481 F. 2d 963 (1st Cir. 1973), which enjoined application of the deposits-based tax to federal associations. See p. 5, *supra*.

[61] Additionally, appellants lack standing to make this argument. *Data Processing Service* v. *Camp*, 397 U.S. 150, 152 (1970) (the first question in standing is whether the challenged action has caused plaintiff injury in fact, economic or otherwise); *Sierra Club* v. *Morton*, 405 U.S. 727, 734-735 (1972) (party seeking review of government policy must himself be among those injured by it).

deduction from gross income[62] (App. Br. 52-58). The argument founders on a false premise. Appellants imply that either Congress or this Court has enacted a single, fixed definition of "net income" which the states are obliged to follow. This is not the case. The Court has recognized that "net income" is not a worthy candidate for judicial definition. It treats the term's meaning as a policy issue; net income is gross income less those exclusions or deductions authorized by the taxing authority. *Doyle* v. *Mitchell Brothers Co.*, 247 U.S. 179, 183-187 (1918). *Cf. United States* v. *Kirby Lumber Co.*, 284 U.S. 1, 3 (1931).[63] The adoption of a particular definition would introduce a rigidity especially inappropriate in the tax area, where state policy judgments are given wide latitude. *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 509-510 (1937).[64]

[62] In the state court appellants treated their grievance about distributions primarily as a state law issue, arguing that such distributions should be included in the term "operating expenses" in § 11. The court disagreed. J.S. 35, Mass. Adv. Sh. (1977) at 903-904, 363 N.E. 2d at 480. This judgment on state law has not been appealed, and in any event should be deemed conclusive. *See Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 109 (1975).

[63] Expert tax commentators share the Court's recognition of the futility in trying to "capture the concept of income and confine it within a phrase." S. Surrey and W. Warren, *The Income Tax Project of the American Law Institute: Gross Income, Deductions Accounting, Gains and Losses, Cancellation of Indebtedness*, 66 Harv. L. Rev. 761, 771 (1953).

[64] Appellants endeavor to gain support for their preferred definition of net income from accounting texts, an inadequate surrogate for legislative history, especially in light of federalism principles supporting state judgments on tax policy. *See Butler Brothers* v. *McColgan*, 315 U.S. 501, 507 (1942); *cf. Ivan Allen Co.* v. *United States*, 422 U.S. 617, 635 (1975).

IV. The Associations' Commerce Clause Argument Lacks Supporting Evidence and is Contradicted by the Fundamental Principle that a Domiciliary Corporation Must Share the Costs of State Government.

The associations are all institutions domiciled in Massachusetts. They have their home offices in Massachusetts, and the record shows no branch office in any other state. Further, the appellants have introduced no evidence whatever that any of their income derives from activities outside Massachusetts.

Such circumstances do not merit the attention of the Commerce Clause. The fact of domicile,[65] coupled with an absence of proof that out-of-state property or activities are being taxed, disposes of the issue. This Court has without exception held:

> The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the

[65] Unlike labels which emphasize "draftsmanship and phraseology," *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 281 (1977), domicile imports a reasoned analysis of both the nexus between the taxpayer and the state, and the benefits conferred on the taxpayer by the state. Only in exceptional circumstances, not presented by the record in this case, is domicile an insufficient foundation for taxation. *See Standard Oil Co.* v. *Peck*, 342 U.S. 382, 383-384 (1952) (state cannot levy *ad valorem* personal property tax on river barges lacking contact with the state); *but see Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 294-295 (1944).

> attendent right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government. *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 279 (1932) (Stone, J.).

The *Lawrence* case concerned an individual who brought a due process challenge to his domiciliary state's taxation of income derived from activities elsewhere. The Court rejected the claim. Eleven years later, in *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649 (1942), the Court (again through Chief Justice Stone) applied parallel reasoning to reject a corporation's Commerce Clause attack on income tax imposed by its state of "commercial domicile":

> [E]ven if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there . . . is not prohibited by the commerce clause on which alone taxpayer relies. 315 U.S. at 656.[66]

[66] More recently, the Court has indicated that the cases which raise substantial problems under the Commerce Clause involve nondomiciliary taxpayers. In *General Motors Corp.* v. *Washington*, 377 U.S. 436, 441 (1964), the Court stated:

> [T]he question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. *Where . . . the taxing State is not the domiciliary State*, we look to the taxpayer's business activities within the State . . . to determine . . . ". . . whether the state has given anything for which it can ask return" (quoting *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 [1940]) (emphasis added).

As with other domiciliaries, every federal savings and loan association which is a party to this appeal bears a responsibility to "pay its way." *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U.S. 252, 259 (1919). As long as the center of activity is Massachusetts, income from business with interstate elements may be taxed along with income from purely intrastate business. *General Motors Corp.* v. *Washington*, 377 U.S. 436, 439 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458-465 (1959); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 294-298 (1944); *Matson Navigation Co.* v. *State Bd. of Equalization of Calif.*, 297 U.S. 441, 443-444 (1936); *Wisconsin* v. *Minnesota Mining Co.*, 311 U.S. 452, 453 (1940); *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 120 (1920); *United States Glue Co.* v. *Oak Creek*, 247 U.S. 321, 327 (1918).

Thus, even if the associations carried on interstate commerce, the tax imposed by § 11 would not be undermined.[87] Moreover, in this case the record contains no evidence that interstate commerce is involved in the activities which are taxed. The measure of the tax is each association's net operating income. The primary source of that income is from interest paid by those who have borrowed money to purchase real estate and build homes. *See* 12 U.S.C. § 1464(c). Appellants present no evidence as to how many, if any, of these borrowers live outside Massachusetts. They offer no proof that any of the loan transactions took place

[87] It is axiomatic that the act of doing business in interstate commerce does not relieve a corporation from its just share of the state tax burden even though it increases the cost of doing business. *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 108 (1975); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938). *See Complete Auto Transit, Inc.* v. *Brady*, *supra*, 430 U.S. at 288 (Court has rejected proposition that interstate commerce is immune from taxation).

outside Massachusetts. Since the offices of the associations are within the state, it is unlikely that loan transactions are centered anywhere but Massachusetts. Appellants do present evidence that a portion of their loans are secured by out-of-state real estate (A. 134). But the tax is imposed on income, not real estate, and the situs of the property is immaterial to Commerce Clause analysis.[88] The associations have therefore failed to shoulder, much less carry, their burden of proof.

This Court has left no doubt that it is the taxpayer who must establish his case on the record:

> The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption. *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 537 (1951).

Accord, General Motors Corp. v. *Washington*, *supra*, 377 U.S. at 441; *cf. Shaffer* v. *Carter*, 252 U.S. 37, 55 (1920).[89]

Similar practical principles dispose of appellants' assertions about multiple tax burdens. One danger in permitting any state taxes on foreign corporations is that multiple taxes imposed by a number of states might, in cumulation, intrude

[88] Appellees recognize that Massachusetts has no power to impose a tax on tangible property permanently located in another state. *See Northwest Airlines, Inc.* v. *Minnesota*, *supra*.

[89] In *Norton Co.* v. *Department of Revenue*, *supra*, the Court pointed out that the appellants' burden is not met by "showing a fair difference of opinion which as an original matter might be decided differently. . . . [W]e have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence." 340 U.S. at 537-538.

impermissibly on interstate commerce. *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 256, 258 (1938); *see General Motors Corp.* v. *Washington, supra*, 377 U.S. at 440. It is fear of multiple taxation which leads the Court on occasion to insist that the state adopt a formula to apportion income in such a way that only income related to the taxpayer's business contacts in the state will be subject to tax. *Id.* at 440-441. However, the Court does not express such fears or impose apportionment when the tax emanates from the state of domicile and the subject of the tax has not establsihed a "tax situs" elsewhere. *Central Railroad Co.* v. *Pennsylvania*, 370 U.S. 607, 612 (1962); *cf. Standard Oil Co.* v. *Peck*, 342 U.S. 382, 384 (1952). Indeed, a decision precluding state taxation of a domiciliary corporation, solely on speculation that another state might attempt to tax the same items, would serve to exempt a corporation from any tax on its interstate operations.[70] Such notions of immunity have long since been rejected. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288 (1977). Accordingly, this Court — emphasizing that it "cannot deal in abstractions" — has held that when "[t]here is nothing to show that multiple taxation is present[,]" a taxpayer's claim fails of proof. *Northwestern States Portland Cement Co.* v. *Minnesota, supra*, 358 U.S. at 463. The associations have not shown that they are victims of multiple taxation, or that they are likely to be.[71] Their

[70] Here, as in *Hawley* v. *City of Malden*, 232 U.S. 1, 13 (1914):

> The real ground of complaint . . . is not that . . . [income is] taxed in one place rather than in another but that . . . [it is] taxed at all . . ..

[71] The associations' reliance on *Brady* v. *John Hancock Mut. Life Ins. Co.*, ___ Miss. ___, 342 So. 2d 295 (1977), *appeal dismissed for want of a substantial federal question*, ___ U.S. ___, 98 S. Ct. 32 (1977), is misplaced. The tax in *Brady* was upheld on the basis of specific evidence in the record that the taxpayer, an insurance company, had offices and agents in Mississippi, qualified to do business in Mississippi, carried on insurance and mortgage-lending business which were interrelated, and made loans to local residents. 342 So. 2d at 296, 297, 304. Thus in *Brady* there was sufficient evidence of contacts between the state and the taxpayer to justify the tax. *See National Geographic Society* v. *California Bd. of Equalization*, 430 U.S. 551, 560 (1977); *see also General Motors Corp.* v. *Washington, supra*, 377 U.S. at 442-446.

In this case, by contrast, there is nothing to contradict the finding below that

> [t]he record is devoid of any information with respect to the contacts and activities of any individual Federal savings and loan association in any other jurisdiction. J.S. 39, Mass. Adv. Sh. (1977) at 908, 363 N.E. 2d at 482.

On this record the associations fall within the protective ambit of *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 754-758 (1967), and *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 341-342 (1954), and could not be taxed by a neighboring state. Thus the jeopardy of multiple taxation asserted by the appellants is tenuous in law as well as unfounded in fact. *See National Geographic, supra*, 430 U.S. at 556 (Court does not adopt "slightest presence" standard of constitutional nexus); *see also General Motors Corp., supra*, 377 U.S. at 449 (taxpayer has not demonstrated "what definite burden in a constitutional sense" it suffers from multiple taxation).

claim that § 11 violates the Commerce Clause is without merit and should be rejected.

V. The Associations' Due Process and Equal Protection Claims are Insubstantial.

Appellants' arguments under the Due Process and Equal Protection Clauses of the Fourteenth Amendment restate prior claims, in different dress. They contend that apportionment of income according to state of origin is compelled

by due process, but they offer no evidence that income can be fairly allocated to any state other than Massachusetts. Moreover, their claim fails on an independent ground. The associations are domiciled in Massachusetts, and, as indicated above, § 11 comes well within the taxing powers of a domiciliary state. This Court has stated:

> If . . . property has had insufficient contact with States other than the owner's domicile to render any one of these jurisdictions a "tax situs," it is surely appropriate to presume that the domicile is the only State affording the "opportunities, benefits, or protection" which due process demands as a prerequisite for taxation. . . . *Central Railroad Co.* v. *Pennsylvania*, 370 U.S. 607, 612 (1962) (citation omitted).

See Northwest Airlines, Inc. v. *Minnesota*, 322 U.S. 292, 294 (1944).

A taxpayer has a heavy burden of proof in trying to overcome the strong presumption favoring the taxing power of the domiciliary state. It must, at a minimum, show that the subject of the tax, here the interest from mortgage loans, may be similarly taxed in another jurisdiction. *Central Railroad Co.* v. *Pennsylvania, supra.* This appellants have failed to do.

Finally, the associations assert, without great vigor, that the deduction for required additions to guaranty funds denies them equal protection of the laws. It is doubtful that the record establishes any inequality, in practical effect, sufficient to invoke a constitutional inquiry into the statute's rationality. *See Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 283-284 (1932). In any event, the discretion of the states in setting tax policy is very broad. *Lehnhausen* v.

Lake Shore Auto Parts Co., 410 U.S. 356, 359-365 (1973). The Massachusetts Legislature is to be afforded "the widest possible latitude within the limits of the Constitution," *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 510 (1937), for "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940). The challenged deduction reflects rational policymaking, not "a hostile and oppressive discrimination against particular persons and classes." *Id.* Appellants' equal protection claim is therefore insubstantial.

Conclusion.

For the reasons presented above the Court should affirm the judgment of the Supreme Judicial Court.

Respectfully submitted,

FRANCIS X. BELLOTTI,*
Attorney General,
S. STEPHEN ROSENFELD,
Assistant Attorney General,
JOHN E. BOWMAN, JR.,
Assistant Attorney General,
MARGOT BOTSFORD,
Assistant Attorney General.

*The assistance of Jill Nexon and Robert J. Baum, Class of 1978, Boston College Law School, is gratefully acknowledged.

Statutory Appendix.

Title 12, United States Code, § 1464(h) (1970).

(h) Exemptions from taxation.

No State, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

Revised Statutes, § 5219, 44 Stat. 223 (1926).

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

(a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in

competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by non-residents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any

subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof to the extent that such tax would be valid under said section.

(Approved, March 25, 1926.)

MASS. GEN. LAWS ANN. c. 63, § 11 (WEST 1977).

Every savings bank as defined in chapter one hundred and sixty-eight, every cooperative bank as defined in chapter one hundred and seventy and every state or federal savings and loan association located in the commonwealth shall pay to the commissioner an annual excise equal to the following:

(*a*) on or before the twenty-fifth day of the seventh month of the taxable year, there shall be paid (1) six hundred twenty-seven one thousandths per cent of a reasonable estimate of its net operating income, as hereinafter defined, for the taxable year, and (2) one-sixteenth of one per cent of the average amount of its deposits or of its savings accounts and share capital for the first six months of the taxable year, after deducting from such average amounts (i) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (ii) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by the commonwealth the unpaid balances on such of its loans

secured by the mortgage of real estate located outside of the commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of such six-month period; and

(*b*) on or before the twenty-fifth day of the first month following the close of the taxable year, there shall be paid (1) one and two hundred fifty-four one thousandths per cent of its net operating income, as hereinafter defined, for the taxable year, less the estimated amount previously paid with respect to such income, and (2) one-sixteenth of one per cent of the average amounts of its deposits or of its savings accounts and share capital for the second six months of the taxable year, after deducting from such average amount (i) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (ii) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by this commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of this commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of the taxable year.

For the purpose of this section, "net operating income" shall mean gross income from all sources, without exclusion, for the taxable year, less (i) operating expenses, (ii) net losses upon assets sold, exchanged or charged off as uncollectible during the taxable year, and (iii) minimum additions during the taxable years to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities; and "taxable year" shall mean any fiscal or calendar year or period for which the bank is required to make a

return to the federal government. Federal and state taxes paid or accrued during the taxable year shall not be deductible in computing "net operating income".

FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 16 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL.,
APPELLANTS,

v.

STATE TAX COMMISSION, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Reply Brief for the Appellants.

CHESTER M. HOWE,
MAXWELL D. SOLET,
GASTON SNOW & ELY BARTLETT,
One Federal Street,
Boston, Massachusetts 02110.
(617) 426-4600
Attorneys for the Appellants.

ADDISON C. GETCHELL & SON, INC., THE LAWYERS' PRINTER, BOSTON

Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-334.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL.,
APPELLANTS,

v.

STATE TAX COMMISSION, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Reply Brief for the Appellants.

The Appellants reply as follows to the brief on the merits ("Brief") filed by the State Tax Commission ("Commission").

A. Credit Unions.

The Federal tax exemption of credit unions, heavily relied upon by the Commission, reflects at most a Federal judgment regarding a class consisting of the credit unions of all states, as well as Federal credit unions — and not a judgment regarding certain large Massachusetts credit unions. The Federal judgment was entered in 1951 —

twenty-seven years ago. In recent years, the Federal policy has been under review with changes recommended. Brief at 29, n.44.

The current Federal Executive judgment on the same issue is contained in President Carter's Tax Message as sent to Congress on January 21, 1978. The portions of the message applicable to credit unions are as follows:

> Credit unions were exempted from taxation in the days when these institutions were small entities with close bonds among the members and few powers to provide extensive financial services. I am recommending changes that will recognize the contemporary practices of financial institutions and will bring the tax treatment of . . . savings and loan associations and credit unions more in line with the taxation of other businesses.

and:

> (3) Credit Unions. Credit unions are tax-exempt. Yet, their powers and functions are defined so broadly that the term "credit union" can include financial institutions that are *functionally identical to a savings and loan association.* The tax exemption provides them with an unfair financial advantage over their competitors. I propose that the percentage of exempt income be phased out over a 4-year period, and that credit unions be taxed in the same manner as mutual savings banks and savings and loan associations after 1982.

(Emphasis supplied.)

Because of 12 U.S.C. §1464(h), Massachusetts was obligated to arrive at the same judgment in 1966, when it first imposed a tax on Federal savings and loan associations. By refraining from naming specific institutions, referring only to ones that were "similar," Congress utilized a phrase

capable of reaching new or changed institutions. By choosing to tax Federal savings and loan associations in 1966, Massachusetts was obligated to include all similar institutions within the scope of the tax enacted, including at least the largest credit unions.

B. Guaranty Funds.

The Massachusetts statute allows a deduction from gross income for minimum required additions to a "guaranty fund or surplus." Mass. G.L. c. 63, §11. An understanding of the function of such reserves is critical to the issues presented.

The Commission persistently errs in its description of the character and purpose of a guaranty fund. In its brief in support of its Motion to Dismiss, the Commission states that a guaranty fund "is not available . . . for investment." Brief in Support of Motion to Dismiss at 16. In its brief on the merits, the Commission states that:

> Each institution is disadvantaged in its profit-making activities to the degree that *it must take these funds out of circulation.*

(Emphasis supplied), Brief at 10-11, and:

> It is the institutions with higher guaranty fund requirements which bear a comparative burden, *by having to take more money out of circulation.*

(Emphasis supplied), Brief at 21.

The implication that reserve additions reduce real income is erroneous. The implication that reserve additions reduce assets available for investment is simply wrong. The reverse is true. Additions to surplus add, rather than detract from, earning capacity. A guaranty fund is fully

available for investment and is in no way "out of circulation."

A guaranty fund may be best characterized as the equivalent of the capital stock investment shown on the books of a business corporation. It represents the minimum corporate capital required for sound operations and thus may not be distributed to members, just as distributions to stockholders may not impair the capital of a business corporation under general corporate law. Like the capital account of a business corporation, a guaranty fund is fully utilized in the business. Guaranty funds, or their equivalents, represent the minimum accumulated earnings and profits of the thrift industry. *See* S. Rep. 781, 82d Cong., 1st Sess., U.S. Code Cong. and Adm. Serv. 1997 (1951).

The statutory provisions related to guaranty funds and required reserves are attached for convenience as an appendix hereto.

For the foregoing reasons, the Appellants renew their request that Mass. G.L. c. 63, §§11(a)(1), (b)(1), be declared invalid as applied to Federal savings and loan associations.

Respectfully submitted,

CHESTER M. HOWE,
MAXWELL D. SOLET,
GASTON SNOW & ELY BARTLETT,
One Federal Street,
Boston, Massachusetts 02110.
(617) 426-4600
Attorneys for the Appellants.

Appendix.

12 U.S.C. §1726(b) establishes a reserve requirement for Federal savings and loan associations as follows, in connection with the application for required insurance:

> . . . Each applicant for such insurance shall also file with its application an agreement that during the period that the insurance is in force it . . . will provide adequate reserves satisfactory to the Corporation, to be established in accordance with regulations made by the Corporation, before paying dividends to its insured members; but such regulations shall require the building up of reserves to 5 per centum of all insured accounts within a reasonable period, not exceeding twenty years, and shall prohibit the payment of dividends from such reserves, or the payment of any dividends if any losses are chargeable to such reserves: *Provided,* That the Corporation may extend the twenty-year limitation hereinabove prescribed by not more than ten years in the case of any insured institution if it determines such action to be necessary to meet mortgage needs: *Provided further,* That for any year dividends may be declared and paid when losses are chargeable to such reserves if the declaration of such dividends in such case is approved by the Corporation. As used in this subsection the term "reserves" shall, to such extent as the Corporation may provide, include capital stock and other items, as defined by the Corporation.

Massachusetts General Laws, Chapter 170, §38 establishes a required guaranty fund for Massachusetts cooperative banks as follows:

> Every such corporation shall establish and maintain a guaranty fund to be used to meet losses in its

business from depreciation, disposal or other change in its assets, or to establish reserves therefor. There may be transferred to such fund from the surplus account or other reserve accounts such amounts as the directors from time to time may determine.

At each distribution date and until such fund is at least equal to ten per cent of the assets of the corporation, there shall be transferred thereto five per cent of the net profits; provided, however, that if at any distribution date the guaranty fund and surplus account together amount to at least eleven per cent of the share liability of the corporation, the transfer to the guaranty fund hereinbefore described shall not be required if an equivalent amount is transferred from the surplus account to the guaranty fund.

Massachusetts General Laws, Chapter 168, §58 establishes a required guaranty fund for Massachusetts savings banks as follows:

Such corporation shall establish and maintain a guaranty fund subject to the conditions, limitations and requirements of this section.

1. *Transfers From Income.*—The trustees shall, as of the close of each ordinary dividend period, cause to be transferred to the guaranty fund until it amounts to seven and one-half per cent of the whole amount of deposits, not less than one-eighth nor more than one-fourth of one per cent of the whole amount of deposits, if the dividend period is six months, or a proportional percentage of such amount of deposits if the dividend period is less than six months, provided that the trustees may at their election make the whole or any part of any such transfer to surplus instead of to the guaranty fund, if immediately after said

transfer the guaranty fund shall amount to not less than five per cent of the whole amount of deposits; and provided further that no amount shall be required to be transferred to the guaranty fund if at the close of any dividend period the guaranty fund shall amount to not less than five per cent of the whole amount of deposits and either the guaranty fund and surplus in the aggregate amount to not less than eleven per cent of the whole amount of deposits, or the surplus, undivided profits and reserves, at the beginning of the taxable year of such corporation, determined in accordance with federal income tax laws and regulations relating to mutual savings banks, shall in the aggregate amount to not less than twelve per cent of the whole amount of deposits. For the purposes of such transfers, the whole amount of deposits shall be the amount appearing as of the close of business on the day immediately preceding the day on which deposits go on interest for the next ordinary dividend period, excluding the dividend paid or payable for the period so closed. Except as provided in paragraph 2 of this section, such transfers shall be made from the income which has accumulated since the last preceding ordinary dividend.

2. *Other Transfers.*—The amounts required or permitted to be transferred to the guaranty fund as above prescribed may, by vote of the trustees, be provided by transfers from surplus, other than the bad debt reserve, if immediately prior to any such transfer (*a*) the guaranty fund and surplus shall in the aggregate amount to at least eleven per cent of the whole amount of deposits, or (*b*) the surplus, undivided profits and reserves, at the beginning of the taxable year of such corporation, determined in accordance with federal

income tax laws and regulations relating to mutual savings banks, shall in the aggregate amount to at least twelve per cent of the whole amount of deposits. Subject to the written approval of the commissioner, the trustees may cause to be transferred to the guaranty fund from surplus, other than the bad debt reserve, such amounts and at such times as they deem to be in the best interests of the depositors, if thereby such fund is not increased beyond the limit fixed by paragraph 1 of this section.

3. *Use of Guaranty Fund.*—The guaranty fund shall be held to meet losses in the business of such corporation; provided, however, that except with the written approval of the commissioner, no losses shall be met from such fund if thereby the fund would be reduced to less than seven and one-half per cent of the whole amount of deposits.

Supreme Court, U. S.
FILED
JAN 24 1978
MICHAEL RODAK, JR., CLERK

No. 77-334

In the Supreme Court of the United States

OCTOBER TERM, 1977

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL., APPELLANTS

v.

STATE TAX COMMISSION, ET AL.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, Jr.,
Solicitor General,
M. CARR FERGUSON,
Assistant Attorney General,
STUART A. SMITH,
Assistant to the Solicitor General,
DAVID ENGLISH CARMACK,
Attorney,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Statutory provisions involved	2
Question presented	2
Statement	3
Summary of argument	8
Argument	11
The Massachusetts excise tax measured by the net operating income of savings banks and savings and loan associations is invalid as applied to federal savings and loan associations	11
A. Introduction	11
B. The exemption for Massachusetts credit unions violates Section 5(h) of the Home Owners' Loan Act	14
C. The lesser deduction for required additions to reserves available to federal savings and loan associations does not result in the imposition of a greater overall state tax upon such federal institutions than upon similar Massachusetts-chartered banks	16
Conclusion	20
Appendix	1A

253-976—78——1

CITATIONS

Cases:

	Page
Agricultural Bank v. *Tax Commission*, 392 U.S. 339	2, 12
Diamond National Corp. v. *State Board of Equalization*, 425 U.S. 268	2
First Federal Savings & Loan Assn. v. *Connelly*, 142 Conn. 483, 115 A. 2d 455, appeal dismissed, 350 U.S. 927	16
First Federal Savings and Loan Ass'n v. *Loomis*, 97 F. 2d 831	12
Laurens Federal Savings & Loan Assn. v. *South Carolina Tax Commission*, 365 U.S. 517	9, 12, 19
Lehnhausen v. *Lake Shore Auto Parts Co.*, 410 U.S. 356	17
Manchester Sav. & Loan Ass'n v. *State Tax Commission*, 105 N.H. 17, 191 A. 2d 529	16, 17
McCulloch v. *Maryland*, 4 Wheat. 316	11
Mercantile Bank v. *New York*, 121 U.S. 138	12
Michigan Nat. Bank v. *Michigan*, 365 U.S. 467	13, 20
State v. *Minnesota Federal Savings & Loan Ass'n.*, 218 Minn. 229, 15 N.W. 2d 568	16, 17
Tradesmen Nat. Bank v. *Oklahoma Tax Commission*, 309 U.S. 560	11, 13, 20
United States v. *State Tax Commission*, 481 F. 2d 963, affirming 348 F. Supp. 397	6, 11, 12, 19
Constitution, statutes and regulations:	
United States Constitution:	
Fourteenth Amendment	2
Federal Home Loan Bank Act, 47 Stat. 725, as amended, 12 U.S.C. 1421–1449	3

	Page
Constitution, statutes and regulations—Con.	
Home Owners' Loan Act of 1933, 48 Stat. 128, as amended, 12 U.S.C. (and Supp. V) 1461 et seq.:	
Section 5, 12 U.S.C. (and Supp. V) 1464	4
Section 5(a), 12 U.S.C. 1464(a)	3
Section 5(c), 12 U.S.C. (and Supp. V) 1464(c)	4, 15
Section 5(h), 12 U.S.C. 1464(h)	*passim*, 1A
Mass. Acts 1966, ch. 14, Section 11	5
Mass. Gen. Laws, Ann. Laws of Mass. (1977 and 1977 Cum. Supp.):	
ch. 63, Section 11	2, 5, 7, 1A
ch. 168, Section 58	18
ch. 170, Section 38	18
ch. 171:	
Section 2	8
Section 7(c)	7
Section 10	7
Section 21	8
Section 24	8, 9, 15
Section 24(B)(*a*)(4)	15
Section 24(B)(*b*)(4)	7–8
Section 24(B)(*b*)(7)	8
Section 24(B)(*b*)(8)	15
National Housing Act, Section 403(b), 48 Stat. 1257, as amended by Section 707 of the Emergency Home Finance Act of 1970, 84 Stat. 463, 12 U.S.C. 1726(b)	5, 18
Rev. Stat. 5219, as amended, 12 U.S.C. 548	12
Federal Home Loan Bank Board Regulations:	
12 C.F.R. 544.1	4, 18

Constitution, statutes and regulations—Con. Page
12 C.F.R. 544.8 ---- 4, 18
12 C.F.R. 545.6–1 *et seq* ---- 4
12 C.F.R. 545.6–1(a)(l)(i) ---- 15
12 C.F.R. 563.13(a) ---- 5, 18
Miscellaneous:
Annual Report of the Commissioner of Banks, Commonwealth of Massachusetts, Division of Banks and Loan Agencies, Section B (Credit Unions) (1973) ---- 17
35 Fed. Reg. 4044 ---- 4, 18
H.R. Rep. No. 91–1131, 91st Cong., 2d Sess. (1970) ---- 18

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77–334

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL., APPELLANTS

v.

STATE TAX COMMISSION, ET AL.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of November 14, 1977, inviting the Solicitor General to express the views of the United States.

OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court (J.S. App. A 27–45) is not yet officially reported.

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on May 3, 1977 (J.S. 3).

The appeal was filed on July 20, 1977 (J.S. App. B 47–49), and probable jurisdiction was noted on November 14, 1977.

The Supreme Judicial Court of Massachusetts held that a state excise tax imposed upon appellants, the federal savings and loan institutions located in Massachusetts, did not violate Section 5(h) of the Home Owners' Loan Act of 1933, as amended, 76 Stat. 984, 12 U.S.C. 1464(h), the Commerce Clause, or the Due Process or Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

The jurisdiction of this Court rests on 28 U.S.C. 1257(2), which authorizes an appeal to this Court from the final judgment by the highest court of a state where the validity of a statute of any state is drawn into question on the ground that it violates the Constitution or laws of the United States, and the decision is in favor of its validity. See, *e.g.*, *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339; *Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268.

STATUTORY PROVISIONS INVOLVED

Section 5(h) of the Home Owners' Loan Act of 1933 and Section 11, ch. 63, Massachusetts General Laws, are set forth in the Appendix, *infra*, pp. 1a–3a.

QUESTION PRESENTED

The United States will discuss the following question:

Whether the Massachusetts excise tax imposed upon federal savings and loan associations and measured by their net operating income, violates Section 5(h) of the Home Owners' Loan Act of 1933, which provides that "No State * * * shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such * * * [State] on other similar local mutual or cooperative thrift and home financing institutions."

STATEMENT

1. Appellants are the federal savings and loan associations located in the Commonwealth of Massachusetts (J.S. App. A 28). They are chartered and regulated by the Federal Home Loan Bank Board, an independent federal agency created by Congress in 1932 to meet the needs of the housing and mortgage markets in the United States. See Federal Home Loan Bank Act, 47 Stat. 725, as amended, 12 U.S.C. 1421–1449. In accordance with the statutory purpose, federal savings and loan associations act as local mutual thrift institutions for the investment of funds and for the financing of housing. See Section 5(a), Home Owners' Loan Act of 1933, 48 Stat. 132, 12 U.S.C. 1464(a).

Membership and ownership of savings accounts in a federal savings and loan association are not restricted. With certain exceptions, such an association may make loans on the security of a first lien on real estate, primarily residential, located within 100 miles of its home office or within the state of its home office,

on the security of its shares, or on the security of obligations of the federal government or its agencies. A federal savings and loan association may lend up to 40 percent of its assets on the security of first liens on real property without regard to the location of the property. It may also make certain housing loans guaranteed by the Veterans Administration and the Federal Housing Authority without regard to the location of the residence and may lend up to five percent of its assets on unsecured educational loans without any restrictions as to the residence of the borrower. See Section 5(c), Home Owners' Loan Act of 1933, 48 Stat. 132, as amended, 12 U.S.C. (and Supp. V) 1464 (c); Federal Home Loan Bank Board Regulations 12 C.F.R. 545.6–1 *et seq.*; J.S. App. D 53–59. The holding of shares in a federal savings and loan association is not a prerequisite for obtaining a loan from such an institution. (J.S. App. A 44).

Prior to April 10, 1970, the Federal Home Loan Bank Board required each federal savings and loan association to accumulate a capital reserve equal to 10 percent of its capital at the rate of five percent of net earnings every six months. Federal Home Loan Bank Board Regulations, 12 C.F.R. 544.1. On March 4, 1970, the Board eliminated this requirement and authorized the federal savings and loan associations to amend their charters to delete the capital reserve provisions. See 35 Fed. Reg. 4044; Federal Home Loan Bank Board Regulations, 12 C.F.R. 544.8. However, a federal savings and loan association is still required by law to maintain a reserve, which varies from 0.5

percent of its deposits as of the second anniversary of its charter to five percent of its deposits as of the twentieth anniversary of its charter.[1] See Section 403 (b) of the National Housing Act, 48 Stat. 1257, as amended, 12 U.S.C. 1726(b); Federal Home Loan Bank Board Regulations, 12 C.F.R. 563.13(a).

In 1966, the Commonwealth of Massachusetts extended its excise tax upon savings banks and similar institutions to federal savings and loan associations, which previously had been exempt from it. Under the 1966 amendment, an excise tax is imposed on savings banks, cooperative banks and state or federal savings and loan associations. The tax is measured by percentages of deposits and of net operating income. See Mass. Acts 1966, ch. 14, Section 11; Mass. Gen. Law, ch. 63, Section 11, Appendix, *infra,* pp. 1A–3A.

2. As a result of previous litigation, appellants and the federal government had established that federal savings and loan associations were exempt from the Massachusetts excise tax as it is measured by deposits. The court had held that the excise tax on deposits caused a "greater" tax upon federal associations than upon "other similar" state-chartered savings banks and was therefore barred by Section 5(h) of the Home Owners' Loan Act of 1933, Appendix, *infra,*

[1] Section 403(b) of the National Housing Act was amended by Section 707 of the Emergency Home Finance Act of 1970, 84 Stat. 463, to allow the Federal Savings and Loan Insurance Corporation to extend the 20-year limitation by not more than ten years upon the determination that such action was necessary to meet mortgage needs.

p. 1A. That statute provides that "No State * * * shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." See *United States* v. *State Tax Commission,* 481 F. 2d 963 (C.A. 1), affirming in pertinent part 348 F. Supp. 397 (D. Mass.).

Appellants thereafter brought this suit in the Massachusetts Superior Court seeking a declaration that the Massachusetts excise tax on federal savings and loan associations as measured by their net operating income was unconstitutional or barred by federal statute. The Superior Court reserved decision and reported the case to the Supreme Judicial Court. Thereafter, the Supreme Judicial Court granted appellants' request for direct appellate review (J.S. App. A 27).

Appellants claimed, *inter alia,* that the Massachusetts tax violates Section 5(h) of the Home Owners' Loan Act of 1933, which provides that no tax on a federal savings and loan association shall be "greater than that imposed" by the state on similar local thrift and home financing institutions. Appellants contended that the state tax on their "net operating income" is greater than that imposed on similar local institutions because the deduction available to a federal savings and loan association for "minimum additions * * * to its guaranty fund or surplus required by law or the appropriate federal and state

supervisory authorities" (Mass. Gen. Laws, c. 63, Section 11), is generally lower than the deduction available to a similar state savings institution (J.S. App. A 39).

While the court acknowledged that state savings institutions would generally have available a larger deduction than federal savings and loan associations, it rejected appellants' claim that the difference in treatment violated Section 5(h) of the Home Owners' Loan Act. In the court's view, "[t]he cause of the discrimination is the lower requirements imposed by the Federal regulatory agency on Federal savings and loan associations" (J.S. App. A 40). The court therefore concluded that the Commonwealth of Massachusetts was not the source of the discrimination because its excise tax statute was wholly neutral (*ibid.*).

Appellants also argued that because the Massachusetts excise tax does not apply to credit unions, it is not imposed "on other similar local mutual or cooperative thrift and home financing institutions," and therefore violates Section 5(h) of the Home Owners' Loan Act.[2] The court stated that "[t]here is no ques-

[2] Massachusetts-chartered credit unions are required to provide in their by-laws the conditions of residence, occupation or association which qualify persons for membership. See Mass. Gen. Laws, ch. 171, Section 7(c) (1977). There are limits upon the amounts that an individual may deposit. These limits depend upon the amount of assets of the corporation. Mass. Gen. Laws, ch. 171, Section 10 (1977). Although credit unions having assets in excess of $500,000 may make first mortgage loans on real estate located within 35 miles of the home office or within Massachusetts of up to 80 percent of their shares, deposits, guaranty and reserve funds and undivided earnings (Mass. Gen. Laws, ch. 171, Section 24(B)

tion that a credit union is a 'local mutual or cooperative thrift and home financing institution'" within the meaning of the federal statute (J.S. App. A 42). However, it concluded that the Massachusetts excise tax did not violate Section 5(h) of the Home Owners' Loan Act because a credit union is not "similar" to a federal savings and loan association within the meaning of that statute.

The court observed that "[t]he test for similarity is not what each institution might do but rather what each does in fact * * *" (J.S. App. A 43). The court pointed out that credit unions in practice invest a far lesser proportion of their funds (30.1 percent) in real estate first mortgage loans than federal savings and loan associations (87.7 percent) (J.S. App. A 44).

SUMMARY OF ARGUMENT

A.

Section 5(h) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(h), provides: "No State * * * shall impose any tax on * * * [federal savings and loan] associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such * * * [State] on other similar local mutual or cooperative thrift and home financing institutions." In characterizing the statute, this Court stated: "This

(*b*) (4) and (7) (1977)), they must give priority to personal loans (Mass. Gen. Laws, ch. 171, Section 24; J.S. App. D 54–59). Credit unions may make loans only to their members (Mass. Gen. Laws, ch. 171, Sections 2, 21, 24 (1977)).

provision unequivocally bars discriminatory state taxation of the Federal Savings and Loan Associations." *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Commission,* 365 U.S. 517, 523.

Massachusetts imposes an excise tax measured by net operating income and deposits upon every savings bank, cooperative savings bank, and savings and loan association. There is, however, an exemption from the tax for Massachusetts credit unions. While the Supreme Judicial Court of Massachusetts acknowledged (J.S. App. A 42) that Massachusetts credit unions were "local mutual or cooperative thrift and home financing institution[s]," it held that they were not "similar" to federal savings and loan associations within the meaning of Section 5(h) of the Home Owners' Loan Act.

We agree with appellants that the court below erred in concluding that Massachusetts credit unions were not "similar" to federal savings and loan associations. Both types of institutions have: (1) mutuality of ownership and control; (2) the ability to attract savings; and (3) the ability to make first mortgage residential real estate loans on substantially the same terms. While credit unions may make loans only to members and are required to give "preference" to personal loans (Mass. Gen. Law, ch. 171, Section 24 (1977)), these distinctions do not justify the conclusion of the court below that a Massachusetts credit union is not "similar" to a federal savings and loan association. Although there are no statutory limita-

tions on the membership of a credit union, the smallest deposit will qualify a prospective borrower as a member. Moreover, there is no enforcement of the statutory "preference" in favor of personal loans. Indeed, in 1972, Massachusetts credit unions had 42 percent of their total loans in real estate mortgages. As of the end of the following year, they had $329 million in outstanding mortgage loans.

Thus, both credit unions and federal savings and loan associations perform the same functions of attracting savings and making loans, substantial amounts of which are first mortgage residential loans. They are accordingly "similar" within the meaning of Section 5(h) of the Home Owners' Loan Act. Since Massachusetts credit unions are exempt from the Massachusetts excise tax to which federal savings and loan associations are subject, the tax is invalid under that federal statute.

B.

Appellants also argue that the portion of the excise tax measured by net operating income is greater upon federal savings and loan associations than upon similar Massachusetts-chartered banks because federal savings and loan associations have a lesser deduction available for required additions to reserves. While federal associations do have a lesser reserve deduction than similar state institutions, we do not believe that this fact demonstrates of itself that federal associations pay a greater tax than similar Massachusetts savings banks in violation of Section 5(h) of the

House Owners' Loan Act. That statute prohibits "only those systems of state taxation which discriminate in practical operation against [federal savings and loan associations]" (*Tradesmen Nat. Bank* v. *Oklahoma Tax Commission,* 309 U.S. 560, 567). As a result of the decision in *United States* v. *State Tax Commission,* 481 F. 2d 963 (C.A. 1), federal savings and loan associations are not required to pay the portion of the Massachusetts excise tax measured by deposits. However, Massachusetts-chartered savings institutions are required to pay both the portion of the tax measured by deposits and that measured by net operating income. Since appellants have not shown that the discrimination caused by the lesser reserve deduction was not compensated for by the judicial exemption for federal savings and loan associations from the tax measured by deposits, we do not believe that the lesser reserve deduction violates Section 5(h) of the Home Owners' Loan Act.

ARGUMENT

THE MASSACHUSETTS EXCISE TAX MEASURED BY THE NET OPERATING INCOME OF SAVINGS BANKS AND SAVINGS AND LOAN ASSOCIATIONS IS INVALID AS APPLIED TO FEDERAL SAVINGS AND LOAN ASSOCIATIONS

A. INTRODUCTION

Since *McCulloch* v. *Maryland,* 4 Wheat. 316, announced the rule that a bank chartered by the United States to perform a federal function was immune from state taxation under the Supremacy Clause, such

institutions have been consistently regarded as tax-exempt instrumentalities of the federal government, except to the extent that Congress has waived their immunity from state taxation. See, *e.g.*, *Agricultural Bank* v. *Tax Commission,* 392 U.S. 339, 340; *United States* v. *State Tax Commission,* 481 F. 2d 963, 969 (C.A. 1); *First Federal Savings and Loan Ass'n* v. *Loomis,* 97 F. 2d 831, 837 (C.A. 7). See also *Mercantile Bank* v. *New York,* 121 U.S. 138, 154.

Although Congress has waived the immunity of federal savings and loan associations from state taxation, it has prohibited the states from imposing discriminatory taxes upon them. Section 5(h) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(h), Appendix, *infra,* p. 1A, provides: "No State * * * shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." "This provision unequivocally bars discriminatory state taxation of the Federal Savings and Loan Associations." *Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Commission,* 365 U.S. 517, 523.

In construing a similar statute (Rev. Stat. 5219, as amended, 12 U.S.C. 548), which bars state taxation of the shares of national banks "at a greater rate than is assessed upon other moneyed capital * * * coming into competition with the business of national banks * * *," this Court observed that Congress intended "to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class." *Tradesmens Nat. Bank* v. *Oklahoma Tax Commission,* 309 U.S. 560, 567; *Michigan Nat. Bank* v. *Michigan,* 365 U.S. 467, 473.

Here, Massachusetts imposes upon every savings bank, cooperative savings bank, and savings and loan association an excise tax measured in part by deposits or savings accounts and share capital and in part by net operating income. This litigation focuses upon the portion of the tax measured by net operating income.

Appellants advance two principal contentions that Section 5(h) of the Home Owners' Loan Act of 1933 bars the tax as measured by net income. First, they contend that the state tax exemption for Massachusetts credit unions results in discriminatory taxation in violation of Section 5(h) of the Home Owners' Loan Act of 1933. Second, appellants contend that the tax is greater as applied to a federal savings and loan association because the latter has a lesser deduction available for required additions to its guaranty fund or surplus.[3]

[3] Appellants also argue (Br. 61–72) that the tax violates the Commerce Clause and the Due Process Clause because of its failure to provide for apportionment between Massachusetts and non-Massachusetts income. They also urge (Br. 73) that the use of different methods of computing the deduction for additions to the reserve violates the Equal Protection Clause. Since we submit that the case can be disposed of on the basis of Section 5(h) of the Home Owners' Loan Act of 1933, we do not address appellants' constitutional contentions.

B. THE EXEMPTION FOR MASSACHUETTS CREDIT UNIONS VIOLATES SECTION 5(h) OF THE HOME OWNERS' LOAN ACT

Appellants argue (Br. 30–46) that the Massachusetts excise tax is invalid as applied to federal savings and loan associations because it is not imposed upon Massachusetts credit unions. While the court below acknowledged (J.S. App. A 42) that Massachusetts credit unions were "local mutual or cooperative thrift and home financing institution[s]," it concluded that they were not "similar" to federal savings and loan associations within the meaning of Section 5(h) of the Home Owners' Loan Act.

We agree with appellants that the court below erred in holding that Massachusetts credit unions were not "similar" to federal savings and loan associations. Section 5(h) of the Home Owners' Loan Act prohibits a state from imposing upon federal savings and loan associations any tax greater than that imposed upon "similar" local mutual or cooperative thrift and home financing institutions. But the statutory term "similar" does not mean identical. The policy of Section 5(h) is to insure that the states do not put federal savings and loan associations to any competitive disadvantage *vis-a-vis* local savings institutions.

Here, as appellants correctly point out (Br. 36), Massachusetts credit unions and federal savings and loan associations are similar with respect to three fundamental elements: (1) mutuality of ownership and control; (2) the ability to attract savings; and (3) the ability to make first mortgage residential real estate loans on substantially the same terms and to

substantially the same extent as federal savings and loan associations. Specifically, credit unions have the statutory authority to make loans secured by first mortgages on real estate for terms up to 30 years, for 90 percent of the value of the property, and to a maximum amount of $40,000. See Mass. Gen. Laws, ch. 171, Section 24(B)(*a*)(4) and (*b*)(8) (1977). Federal savings and loan associations may also make real estate loans for a maximum term of 30 years, for 80 percent of the value of the property, and to a maximum amount of $55,000. See 12 U.S.C. (and Supp. V) 1464(c); 12 C.F.R. 545.6–1(a)(1)(i).

While credit unions may make loans only to members and are required to give "preference" to personal loans (Mass. Gen. Laws c. 171, Section 24 (1977)), these distinctions do not establish that a Massachusetts credit union is not "similar" to a federal savings and loan association. There are no statutory limitations on the membership of a credit union, and the smallest deposit will qualify a prospective borrower as a member. Moreover, there is no statutory enforcement of the "preference" in favor of personal loans. Indeed, as the court below observed (J.S. App. A 44), in 1972 Massachusetts credit unions had 30.1 percent of their total dollar investments in real estate mortgages and 42 percent of their total loans were in real estate mortgages.

These statistics demonstrate that Massachusetts credit unions are in all pertinent respects "similar" to federal savings and loan associations. Both credit unions and federal savings and loan associations per-

form the same functions, *viz.*, they attract savings upon which they pay interest, and make loans, substantial amounts of which are first mortgage residential loans.

In view of these similarities, the exemption for Massachusetts credit unions from the Massachusetts excise tax to which federal savings and loan associations are subject renders the tax invalid as applied to such federal institutions under Section 5(h) of the Federal Home Owners' Loan Act.[4]

C. THE LESSER DEDUCTION FOR REQUIRED ADDITIONS TO RESERVES AVAILABLE TO FEDERAL SAVINGS AND LOAN ASSOCIATIONS DOES NOT RESULT IN THE IMPOSITION OF A GREATER OVERALL STATE TAX UPON SUCH FEDERAL INSTITUTIONS THAN UPON SIMILAR MASSACHUSETTS-CHARTERED BANKS

Appellants also argue (Br. 20–30) that the portion of the excise tax measured by net operating income is

[4] The court below (J.S. App. A 42) relied upon the decisions of other courts, which it characterized as holding that federal savings and loan associations are not similar to state-chartered credit unions. See *First Federal Savings & Loan Assn.* v. *Connelly*, 142 Conn. 483, 115 A. 2d 455, appeal dismissed for want of a substantial federal question, 350 U.S. 927; *State* v. *Minnesota Federal Savings & Loan Ass'n*, 218 Minn. 229, 15 N.W. 2d 568; *Manchester Sav. & Loan Ass'n* v. *State Tax Commission*, 105 N.H. 17, 191 A. 2d 529.

But the Connecticut decision did not focus upon the differences between state-chartered credit unions and federal savings and loan associations. Rather, the Connecticut court upheld a constitutional challenge to a state income tax on savings and loan associations which did not permit a deduction for dividends paid.

Moreover, the competitive impact of the credit unions for savings and mortgage dollars involved in the Minnesota and New Hampshire decisions was considerably more limited than that of the Massachusetts credit unions. There were 374 Minnesota credit unions having 75,297 members and $2,172,000 in real estate mortgage loans (218 Minn. at 232, 15 N.W. 2d at 570). Likewise, the New Hampshire court observed "* * * that credit unions have smaller assets, grant more unsecured loans and fewer real estate loans, own less property and real estate, than the plaintiffs [federal savings and loan associations] and other banks" (105 N.H. at 20, 191 A. 2d at 532). Here, however, as of the end of 1973, Massachusetts credit unions had more than $329 million in mortgage loans outstanding. See *Annual Report of the Commissioner of Banks*, Commonwealth of Massachusetts, Division of Banks and Loan Agencies, Section B (Credit Unions), pp. 80–81 (1973). We have been advised by appellants that they are lodging a copy of this report with the Clerk.

Finally, the Minnesota decision, which the New Hampshire court followed, turned principally upon the equal protection ground that the classification between credit unions and savings banks was based "on a reasonable ground * * * for purposes of taxation" (218 Minn. at 239, 15 N.W. 2d at 573). The Minnesota court concluded that since the exemption of credit unions did not violate the Equal Protection Clause of the Fourteenth Amendment, it did not violate Section 5(h) of the Home Owners' Loan Act (218 Minn. at 238–241, 15 N.W. 2d at 523–524).

But this conclusion by no means follows. The courts have traditionally permitted the states great latitude for equal protection purposes in making classifications for tax purposes. See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356. In contrast, Section 5(h) of the Home Owners' Loan Act contains an absolute prohibition upon taxation of federal savings and loan associations that is greater than that imposed upon similar state-chartered institutions.

greater upon federal savings and loan associations than upon similar Massachusetts-chartered banks because federal savings and loan associations have a lesser deduction available for required additions to

reserves.[5] Although circumstances may vary from year to year, the court below stated (J.S. App. A 39) that "we accept the associations' assertion that, generally, the required contributions of a Federal savings and loan association to its surplus are less than those of similarly situated Massachusetts savings and cooperative banks."[6] However, it rejected appellants' contention that the difference in deductions was discrimination that Section 5(h) of the Home Owners' Loan Act prohibits.

[5] In 1966, at the time Massachusetts instituted the tax, the legally required additions to guaranty funds for federal savings and loan associations and Massachusetts cooperative banks were essentially the same. Massachusetts cooperative banks were required to establish and maintain a guaranty fund equal to at least 10 percent of their assets at the annual rate of 5 percent of net profits. Mass. Gen. Laws, ch. 170, Section 38 (1977). Federal savings and loan associations were likewise required to establish and maintain a capital reserve equal to 10 percent of their capital at the rate of 5 percent of net earnings every six months. Federal Home Loan Bank Board Regulations, 12 C.F.R. 544.1. Massachusetts savings banks are required to establish and maintain a reserve at least equal to 7½ percent of deposits at the annual rate of ⅛ to ¼ of one percent of deposits. Mass. Gen. Laws, ch. 168. Section 58 (1977).

[6] On April 10, 1970, the Federal Home Loan Bank Board reduced the reserve requirements of the federal savings and loan associations. The new requirements varied from 0.5 percent of deposits on the second anniversary of their charters to five percent of deposits on the 20th anniversary of their charters. The time within which a federal association could reach the five percent level could be extended for ten years in special circumstances. Section 403(b) of the National Housing Act, 48 Stat. 1257, as amended, 12 U.S.C. 1726(b); 35 Fed. Reg. 4044; Federal Home Loan Bank Board Regulations, 12 C.F.R. 544.8, 563.13(a). The reduction in the reserve requirements was intended to permit federal savings and loan associations to attract more funds by paying dividends at the maximum rate allowed by law. H.R. Rep. No. 91-1131, 91st Cong., 2d Sess. 15 (1970).

In the court's view, "The cause of the discrimination is the lower requirements imposed by the Federal regulatory agency on Federal savings and loan associations. The Commonwealth is not the source of the discrimination. The excise tax is wholly neutral" (J.S. App. A 40).

We agree with appellants that the difference in treatment cannot be justified, as the court below concluded, on the ground that the cause of the discrimination was the lower reserve requirements the Federal Home Loan Bank Board imposes and not the state statute. The prohibition of Section 5(h) of the Home Owners' Loan Act is clear: "No State * * * shall impose any tax on such [federal] association * * * *greater than that* imposed * * * on other similar local * * * institutions (emphasis added)" Since "[t]his provision unequivocally bars discriminatory state taxation of the Federal Savings and Loan Associations" (*Laurens Federal Savings & Loan Assn.* v. *South Carolina Tax Commission, supra,* 365 U.S. at 523), the source of the discrimination—the fact that in this case it arose from the lesser federal requirements for additions to reserves—is irrelevant.

Moreover, we would agree that appellants' claim of discrimination would have considerable force if the Massachusetts excise tax were measured solely by net operating income. But we do not believe that the difference in reserve requirements violates Section 5(h) in the context of this case involving a tax measured by both net operating income and deposits. As a result of the decision in *United States* v. *State Tax Commission, supra,* federal savings and loan associations are not required to pay the portion of the Massachusetts

excise tax measured by deposits or savings accounts and shares. However, Massachusetts savings and co-operative banks are required to pay both the portion of the tax measured by deposits and that measured by net operating income. Since Section 5(h) prohibits "only those systems of state taxation which discriminate in practical operation against * * * [federal savings and loan associations]" cf. *Tradesmens Nat. Bank,* v. *Oklahoma Tax Commission, supra,* 309 U.S. at 567; *Michigan Nat. Bank* v. *Michigan, supra,* 365 U.S. at 473), appellants could prevail on their claim only by showing that the discrimination arising from the lesser reserve deduction was not compensated for by judicial exemption from the tax measured by deposits. Without that showing, the lesser reserve deduction available to federal savings and loan associations does not demonstrate of itself that such institutions pay a greater tax then similar Massachusetts savings banks. Since appellants have not made such a showing, the tax cannot be invalidated on that ground.

CONCLUSION

The judgment of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
M. CARR FERGUSON,
Assistant Attorney General.
STUART A. SMITH,
Assistant to the Solicitor General.
DAVID ENGLISH CARMACK,
Attorney.

JANUARY 1978.

APPENDIX

Home Owners' Loan Act of 1933, 48 Stat. 128, as amended, 12 U.S.C. 1421 *et seq.*:

Section 5. * * * *

* * * * *

(h) [as amended by Sec. 6(e), Revenue Act of 1962, 76 Stat. 960, 984]. No State, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

Mass. Gen.' Laws, Ann. Laws of Mass. (1977 Cum. Supp.), ch. 63:

Section 11. ***Savings Banks, Co-operative Banks, and Savings and Loan Associations Required to Pay Annual Excise.***

Every savings bank as defined in chapter one hundred and sixty-eight, every co-operative bank as defined in chapter one hundred and seventy and every state or federal savings and loan association located in the commonwealth shall pay to the commissioner an annual excise equal to the following:

(*a*) on or before the twenty-fifth day of the seventh month of the taxable year, there shall be paid (1) six hundred twenty-seven one thousandths per cent of a reasonable estimate of its net operating income, as hereinafter defined, for the taxable year, and (2) one-sixteenth of

one per cent of the average amount of its deposits or of its savings accounts and share capital for the first six months of the taxable year, after deducting from such average amounts (*i*) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (*ii*) the unpaid balances on its loans secured by the mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by the commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of the commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of such six-month period; and

(*b*) on or before the twenty-fifth day of the first month following the close of the taxable year, there shall be paid (1) one and two hundred fifty-four one thousandths per cent of its net operating income, as hereinafter defined, for the taxable year, less the estimated amount previously paid with respect to such income; and (2) one-sixteenth of one per cent of the average amounts of its deposits or of its savings accounts and share capital for the second six months of the taxable year, after deducting from such average amount (*i*) its real estate used for banking purposes, valued at cost less reasonable depreciation, and (*ii*) the unpaid balances on its loans secured by the

mortgage of real estate taxable in this commonwealth, or real estate situated in a state contiguous to the commonwealth, and within a radius of fifty miles of the main office of such bank or association, and in the case of a bank or association not previously subject to tax by this commonwealth the unpaid balances on such of its loans secured by the mortgage of real estate located outside of this commonwealth which are outstanding on March first, nineteen hundred and sixty-six, both as of the close of the taxable year.

For the purpose of this section, "net operating income" shall mean gross income from all sources, without exclusion, for the taxable year, less (*i*) operating expenses, (*ii*) net losses upon assets sold, exchanged or charged off as uncollectible during the taxable year, and (*iii*) minimum additions during the taxable year to its guaranty fund or surplus required by law or the appropriate federal and state supervisory authorities; and "taxable year" shall mean any fiscal or calendar year or period for which the bank is required to make a return to the federal government. Federal and state taxes paid or accrued during the taxable year shall not be deductible in computing "net operating income".

U.S. GOVERNMENT PRINTING OFFICE: 1970